TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 356

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HOME TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,170)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 356

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HOME TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under rule 13, par. 4	1	1
Record from D. C. U. S., Eastern New York	2	1
Summons with notice	2	1
Complaint	3	2
Answer	14	7
Note of issue	20	10
Notice of trial	21	10
Plaintiff's bill of exceptions	22	11
Appearances of counsel	22	11
Agreed statement of facts	24	12
Opinion of the court, Galston, J	43	23
Plaintiff's request for findings	54	29
Amended request for findings of fact	56	30
Defendant's request for findings of fact and conclusions of law	72	40
Motion for judgment on behalf of defendant	73	41
Motion for judgment on behalf of defendant	75	42
Notice of exceptions	77	43
Plaintiff's exceptions to conclusions of law	82	45
Consent to bill of exceptions	84	46
Note re exhibit "A"	85	46
Exhibit "B"—Letter rejecting claims, March 20, 1926	85	47
Notes re exhibits "C" to "J" inc	86	47
Exhibit "K"—Application form for title insurance	88	48
"L"—Policy of title insurance	89	49
"M"—Application form for loan	91	50
"N"—Mortgage guarantee	92	51
"O"—Guaranteed first mortgage certificate	96	53
Notes re exhibits "P" to "Z" inc	98	55
Note re exhibit "YY"	100	56
Notes re Exhibits 1 to 5 inc	100	56

	Original	Print
Record from D. C. U. S., Eastern New York—Continued.		
Order dispensing with printing certain exhibits	102	56
Order for judgment	106	58
Judgment	108	59
Notice and allowance of appeal	109	60
Citation on appeal [omitted in printing]	111	61
Assignment of errors	112	61
Bond on appeal [omitted in printing]	116	63
Order extending time to perfect appeal	122	63
Order settling transcript of record	124	64
Order extending time to perfect appeal	126	64
Stipulation as to record	127	65
Order as to record	127	65
Clerk's certificate [omitted in printing]	128	65
Opinion, Swan, J	129	66
Judgment	134	72
Clerk's certificate [omitted in printing]	136	72
Order allowing certiorari	137	72

1 In United States Circuit Court of Appeals for the Second Circuit

L–3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

against

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Statement under rule 13, par. 4

This suit was commenced on April 21, 1928.

The plaintiff is Home Title Insurance Company; the defendant, the United States of America.

Complaint was filed on April 21, 1928.

Answer was filed on June 8, 1928.

Note of issue and notice of trial were filed on May 8, 1929.

Trial was had on February 24, 1930, and April 8, 1930, an adjourned date, before Honorable Clarence G. Galston, without a jury, pursuant to subdivision (20) of section 24 of the Judicial Code (28 U. S. C. A. §41).

Order for judgment dismissing the action was filed on June 24, 1930.

Judgment in favor of defendant was entered on August 16, 1930.

Appeal on behalf of the plaintiff was taken on August 27, 1930.

2 In United States District Court for the Eastern District of New York

L–3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Summons with notice

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Marcus B. Campbell, Robert A. Inch, and Grover M. Moscowitz, Judges of the District Court of the United States for the Eastern District of New York, at the borough of Brooklyn, this 21st day of April, in the year one thousand nine hundred and twenty-eight.

PERCY G. B. GILKES, (Sgd.)
Clerk.

[SEAL.] By J. A. LEAVENS, (Sgd.)
Deputy Clerk.

WEILL, WOLFF & SATTERLEE,
Plaintiff's attorneys.

Office and post-office address, 52 William Street, Borough of Manhattan, New York City, N. Y.

3 *Summons with notice*

NOTICE.

To the defendant within named:

TAKE NOTICE, That upon default judgment will be taken for the sum of $5,386 dollars, in money, with interest on $1,392 from Nov. 1923, on $1,850 from Feb. 1926, on $2,144 from Sept. 1924, besides costs.

WEILL, WOLFF & SATTERLEE,
Plaintiff's Attorneys.

In United States District Court

[Title omitted.]

Complaint

The plaintiff, by Weill, Wolff & Satterlee, its attorneys, complaining of the defendant, alleges:

For a first cause of action

First.—The plaintiff at all times herein mentioned was and now is a domestic corporation, duly organized and existing under
4 and by virtue of the laws of the State of New York, and has its principal place of business at 51 Willoughby Street, in the Borough of Brooklyn, City, County, and State of New York.

Second.—This is a suit of a civil nature at common law and the matter in controversy exceeds, exclusive of interests and costs, the sum of $3,000 and is less than the sum of $10,000, and this suit and the causes of action herein set forth arise under the Constitution of the United States of America and the laws thereof providing for internal revenue.

Third.—The plaintiff has a just claim against the defendant in the sum of $1,392, with interest thereon. Said claim represents an amount erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York, from the plaintiff, under protest and duress, as an alleged capital stock tax liability of the plaintiff for the year beginning July 1, 1922, under section 1000 of the 1921 act. The Commissioner of Internal Revenue of the United States has at all times wrongfully and unlawfully refused to refund said amount or any part thereof to the plaintiff, although duly demanded, and is so refusing to make refund thereof.

Fourth.—On or about the 26th day of October, 1922, the plaintiff duly made to the Commissioner of Internal Revenue of the United States a capital stock tax return for the year beginning July 1, 1922, under the revenue act of 1921, on the official form prescribed therefor by the Treasury Department and in conformity with the instructions of the said commissioner contained therein.

5 Fifth.—The plaintiff believed it was not subject at the time of making such return to imposition of any capital stock tax by virtue of the fact that it was an insurance company within the meaning of section 246 of the revenue act of 1921 and the exception to the capital stock tax imposed by said act.

Sixth.—The plaintiff subsequently received from the collector of internal revenue for the first district of New York a bill and demand for payment of an alleged capital stock tax liability in the sum of $1,392, which amount the plaintiff, in or about the month of November, 1922, duly paid under protest and duress to the said collector at Brooklyn, New York.

Seventh.—The plaintiff is informed and believes that the defendant has received from the above-mentioned collector in the usual course of his official business and still retains the amount paid by the plaintiff as aforesaid.

Eighth.—On or about February 10, 1926, the plaintiff, in accordance with law, duly filed with the collector of internal revenue for the first district of New York, at Brooklyn, New York, for transmission to the Commissioner of Internal Revenue of the United States, its claim for refund of $1,392, paid by the plaintiff as aforesaid, for the reason stated in said claim:

"That the above company, being an insurance company, is not liable for capital stock tax."

Ninth.—Upon the filing of the above-mentioned claim for refund the plaintiff was entitled, under the provisions of section 281 of the revenue act of 1921 and of section 284 of the revenue act of 1924, to a refund of the amount paid as aforesaid.

6 Tenth.—On or about the 22nd day of April, 1926, the above-mentioned claim for refund was erroneously, illegally, and wrongfully rejected by the defendant through the Commissioner of Internal Revenue.

Eleventh.—Since its organization the plaintiff's business has consisted and now consists of insuring titles to real estate and guaranteeing real-estate mortgages, and in connection with such business and as a part thereof, examining titles to real estate, appraising the value of real estate, and engaging in other activities necessarily incidental thereto.

Twelfth.—Section 1000 of the revenue act of 1921 imposed a special annual excise tax, known as the capital stock tax, upon every domestic corporation with respect to its carrying on or doing business, provided that the tax so imposed should not apply in any year to any insurance company subject to the tax imposed by section 243 or 246 of said act.

Thirteenth.—Sections 243 and 246 of the revenue act of 1921 imposed an annual tax upon the net income of every life-insurance company, for the calendar year 1921 and each taxable year thereafter, and of every insurance company (other than a life or mutual-insurance company) for the calendar year 1922 and each taxable year thereafter, respectively, in lieu of the corporation income tax imposed by section 230 of said act, the excess-profits tax imposed by Title III of the 1921 act, and the aforesaid capital-stock tax.

Fourteenth.—The plaintiff since its organization has been and is an insurance company within the meaning of section 246 of the revenue act of 1921 and the exception to the capital-stock tax imposed by said act.

7 Fifteenth.—There is now due and owing to the plaintiff from the defendant the sum of $1,392, with interest thereon, no part of which has been paid, although payment thereof has been duly demanded.

Sixteenth.—The claimant further avers that it is and has always been the sole owner of the aforesaid claims and has always been the sole owner of the aforesaid claims and has not assigned or transferred the whole or any part thereof, or interest therein, and that it has at all times borne true allegiance to the Government of the United States, and has in no way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

For a second cause of action

Seventeenth.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "First" and "Second."

Eighteenth.—The plaintiff has a just claim against the defendant in the sum of $1,850, with interest thereon. Said claim represents an amount erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York, from the plaintiff, under protest and duress, as an alleged capital stock tax liability of the plaintiff for the year beginning July 1, 1923,

under section 1000 of the 1921 act. The Commissioner of Internal Revenue of the United States has at all times wrongfully and unlawfully refused to refund said amount or any part thereof to the plaintiff, although duly demanded, and is so refusing to make refund thereof.

8 Nineteenth.—On or about the 3rd day of December, 1923, the plaintiff duly made to the Commissioner of Internal Revenue of the United States a capital stock tax return for the year beginning July 1, 1923, under the revenue act of 1921, on the official form prescribed therefor by the Treasury Department and in conformity with the instructions of the said commissioner contained therein.

Twentieth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Fifth."

Twenty-first.—The plaintiff subsequently received from the collector of internal revenue for the first district of New York a bill and demand for payment of an alleged capital stock tax liability in the sum of $1,850, which amount the plaintiff in or about the month of February, 1926, duly paid under protest and duress to the said collector at Brooklyn, New York.

Twenty-second.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Seventh."

Twenty-third.—On or about February 10, 1926, the plaintiff, in accordance with law, duly filed with the collector of internal revenue for the first district of New York, at Brooklyn, New York, for transmission to the Commissioner of Internal Revenue of the United States, its claim for refund of $1,850, paid by the plaintiff as aforesaid, for the reason stated in said claim:

"That the above company, being an insurance company, is not liable for capital stock tax."

9 Twenty-fourth.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "Ninth," "Tenth," "Eleventh," "Twelfth," "Thirteenth," and "Fourteenth."

Twenty-fifth.—There is now due and owing to the plaintiff from the defendant the sum of $1,850, with interest thereon, no part of which has been paid, although payment thereof has been duly demanded.

Twenty-sixth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Sixteenth."

For a third cause of action

Twenty-seventh.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "First" and "Second."

Twenty-eighth.—The plaintiff has a just claim against the defendant in the sum of $2,144, with interest thereon. Said claim represents an amount erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York, from the plaintiff, under protest and duress, as an alleged capital stock tax liability of the plaintiff for the year beginning July 1, 1924, under section 700 of the 1924 act. The Commissioner of Internal Revenue of the United States has at all times wrongfully and unlawfully refused to refund said amount or any part thereof to the plaintiff, although duly demanded, and is so refusing to make refund thereof.

10 Twenty-ninth.—On or about the 17th day of September, 1924, the plaintiff duly made to the Commissioner of Internal Revenue of the United States a capital stock tax return for the year beginning July 1, 1924, under the revenue act of 1924, on the official form prescribed therefor by the Treasury Department and in conformity with the instructions of the said commissioner contained therein.

Thirtieth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Fifth."

Thirty-first.—The plaintiff subsequently received from the collector of internal revenue for the first district of New York a bill and demand for payment of an alleged capital stock tax liability in the sum of $2,144, which amount the plaintiff, in or about the month of September, 1924, duly paid under protest and duress to the said collector at Brooklyn, New York.

Thirty-second.—The plaintiff repeats and reiterates each represensentation and allegation of the paragraph of the complaint numbered "Seventh."

Thirty-third.—On or about February 10, 1926, the plaintiff, in accordance with law, duly filed with the collector of internal revenue for the first district of New York, at Brooklyn, New York, for transmission to the Commissioner of Internal Revenue of the United States, its claim for refund of $2,144 paid by the plaintiff as aforesaid, for the reason stated in said claim:

"That the above company, being an insurance company, is not liable for capital stock tax."

11 Thirty-fourth.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "Ninth," "Tenth," and "Eleventh."

Thirty-fifth.—Section 700 of the revenue act of 1924 imposed a special annual excise tax, known as the capital-stock tax, upon every domestic corporation with respect to its carrying on or doing business, provided that the tax so imposed should not apply in any year to any insurance company subject to the tax imposed by section 243 or 246 of said act.

Thirty-sixth.—Sections 243 and 246 of the revenue act of 1924 imposed an annual tax upon the net income tax of every life insurance company for each taxable year and of every insurance company (other than a life or mutual insurance company) for each taxable year in lieu of the corporation income tax imposed by section 230 of said act, Title III of the 1924 act and the aforesaid capital stock tax.

Thirty-seventh.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Fourteenth."

Thirty-eighth.—There is now due and owing to the plaintiff from the defendant the sum of $2,144, with interest thereon, no part of which has been paid, although payment thereof has been duly demanded.

Thirty-ninth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Sixteenth."

12 Wherefore, plaintiff demands judgment against the United States in the full sum of $5,386, with interest on $1,392 from November, 1922, on $1,850 from February, 1926, and on $2,144 from September, 1924, further averring that it is justly entitled to said amounts from the United States after allowing all just credits and offsets.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office & P. O. Address, No. 52 William Street, Borough of Manhattan, New York, N. Y.

13 [*Duly sworn to by Dwight Comstock; jurat omitted in printing.*]

14 In United States District Court

[Title omitted.]

Answer

The defendant, by its attorney, William A. DeGroot, United States attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, alleges:

First.—Admits the allegations contained in paragraph marked "First" of the complaint herein.

Second.—Admits the allegations contained in paragraph marked "Second" of the complaint herein.

Third.—Denies the allegations set forth in paragraph marked "Third" of the complaint herein.

Fourth.—Admits the allegations contained in paragraph marked "Fourth" of the complaint herein.

Fifth.—Denies the allegations contained in paragraph marked "Fifth" of the complaint herein.

Sixth.—Denies the allegations contained in paragraph marked "Sixth" of the complaint herein.

15 Seventh.—Denies the allegations contained in paragraph marked "Seventh" of the complaint herein.

Eighth.—Denies the allegations contained in paragraph marked "Eighth" of the complaint herein.

Ninth.—Denies the allegations contained in paragraph marked "Ninth" of the complaint herein.

Tenth.—Denies the allegations contained in paragraph marked "Tenth" of the complaint herein.

Eleventh.—Admits the allegations contained in paragraph marked "Eleventh" of the complaint herein.

Twelfth.—Admits the allegations contained in paragraph marked "Twelfth" of the complaint herein.

Thirteenth.—Admits the allegations contained in paragraph marked "Thirteenth" of the complaint herein, and begs leave to refer to the statutes upon the trial of this action.

Fourteenth.—Denies the allegations contained in paragraph marked "Fourteenth" of the complaint herein.

Fifteenth.—Denies the allegations contained in paragraph marked "Fifteenth" of the complaint herein.

Sixteenth.—Denies that it has sufficient information or knowledge sufficient to form a belief as to the allegations contained in paragraph marked "Sixteenth" of the complaint herein and therefore denies the same.

16 Seventeenth.—Admits the allegations contained in paragraph marked "Seventeenth" of the complaint herein.

Eighteenth.—Denies the allegations contained in paragraph marked "Eighteenth" of the complaint herein.

Nineteenth.—Denies the allegations contained in paragraph marked "Nineteenth" of the complaint herein.

Twentieth.—Denies the allegations contained in paragraph marked "Twentieth" of the complaint herein.

Twenty-first.—Admits that under date of February 4, 1926, the sum of one thousand eight hundred and fifty ($1,850.00) dollars was paid by the plaintiff to the collector of the first district, at Brooklyn, New York, for capital stock tax liability, but denies each and every other allegation contained in paragraph marked "Twenty-first" set forth.

Twenty-second.—Denies each and every allegation contained in paragraph marked "Twenty-second" of the complaint herein.

Twenty-third.—Denies the allegations contained in paragraph marked "Twenty-third" of the complaint herein.

Twenty-fourth.—Denies the allegations contained in paragraph marked "Twenty-fourth" of the complaint herein, not hereinbefore admitted.

Twenty-fifth.—Denies the allegations contained in paragraph marked "Twenty-fifth" of the complaint herein.

17 Twenty-sixth.—Denies the allegations contained in paragraph marked "Twenty-sixth" of the complaint, not hereinbefore admitted.

Twenty-seventh.—Admits the allegations contained in paragraph "Twenty-seventh" of the complaint herein.

Twenty-eighth.—Denies the allegations contained in paragraph marked "Twenty-eighth" of the complaint herein.

Twenty-ninth.—Admits the allegations contained in paragraph marked "Twenty-ninth" of the complaint herein.

Thirtieth.—Denies the allegations contained in paragraph marked "Thirtieth" of the complaint herein.

Thirty-first.—Denies the allegations contained in paragraph marked "Thirty-first" of the complaint herein.

Thirty-second.—Denies the allegations contained in paragraph marked "Thirty-second" of the complaint herein.

Thirty-third.—Denies the allegations contained in paragraph marked "Thirty-third" of the complaint herein.

Thirty-fourth.—Denies the allegations contained in paragraph "Thirty-fourth" of the complaint herein not hereinbefore admitted.

Thirty-fifth.—Admits the allegations contained in paragraph marked "Thirty-fifth" of the complaint herein and begs leave to refer to the statute upon the trial of this action.

18 Thirty-sixth.—Admits the allegations contained in paragraph marked "Thirty-sixth" of the complaint herein and begs leave to refer to the statute upon the trial of this action.

Thirty-seventh.—Denies the allegations set forth in paragraph marked "Thirty-seventh" of the complaint herein, not hereinbefore admitted.

Thirty-eighth.—Denies the allegations set forth in paragraph marked "Thirty-eighth" of the complaint herein.

Thirty-ninth.—Denies the allegations contained in paragraph marked "Thirty-ninth" of the complaint herein, not hereinbefore admitted.

Wherefore, defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action.

WILLIAM A. DEGROOT,
United States Attorney,
On behalf of defendant.

Room 211, Federal Building, Brooklyn, New York.

19 [*Duly sworn to by Howard W. Ameli; jurat omitted in printing.*]

20 In United States District Court

[Title omitted.]

Note of issue

Weill, Wolff & Satterlee, 52 William Street, New York City, attorneys for the plaintiff.

Howard W. Ameli, acting United States attorney for the eastern district of New York, room 211, Federal Building, Borough of Brooklyn, city of New York, attorney for the defendant.

Issue was joined on June 8, 1928, by the service of an answer herein upon the said attorneys for the plaintiff.

This is an action to recover taxes which were erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York from the plaintiff under protest and duress as an alleged capital stock tax liability of the plaintiff for the years beginning July 1, 1922, July 1, 1923, and July 1, 1924, whereas in fact, the plaintiff being an insurance company was not liable for the capital stock tax during those years.

The attorneys for the plaintiff request that this cause be added to and placed upon the common law calendar of the United States District Court for the Eastern District of New York for the first Wednesday in June, 1929.

Dated, New York, May 6, 1929.

21 In United States District Court

[Title omitted.]

Notice of trial

Please take notice that the issues of law and fact in the above-entitled cause will be brought on for argument and trial and an inquest taken therein at a trial term of the United States District Court in and for the Eastern District of New York, to be held at the United States courtrooms in the United States post office building, Borough of Brooklyn, City of New York, in the said eastern district of New York, on the 5th day of June, 1929, at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated, New York, May 6, 1929.

Yours, &c.,

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office & P. O. Address, 52 William Street, Borough of Manhattan, New York, N. Y.

To the honorable the ATTORNEY GENERAL OF THE UNITED STATES.

To the honorable the ATTORNEY OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

22 In United States District Court, Eastern District of New York

No. L 3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Plaintiff's bill of exceptions

NEW YORK, *August 27, 1930.*

The above action was tried before the Hon. Clarence G. Galston, United States District Judge, in his chambers in the post office building, at 10.30 a. m., on February 24, 1930, and in his chambers in the Eagle Building, at 10.30 a. m., on April 8, 1930, tried by the court without a jury, pursuant to subdivision (20) of section 24 of the Judicial Code (28 U. S. C. A. §41).

Appearances of counsel

Messrs. Weill, Wolff & Satterlee, attorneys for plaintiff (by Hugh Satterlee, Esq., of counsel).

Hon. Howard W. Ameli, U. S. attorney, attorney for defendant (by Albert D. Smith, Esq., assistant United States attorney, and E. W. Horton, Esq., attorney, Bureau of Internal Revenue, of counsel).

23 By stipulation between counsel for the plaintiff and counsel for the defendant the above action was submitted to the court on February 24, 1930, upon an agreed statement of facts previously filed with the clerk of the United States District Court for the Eastern District of New York on February 21, 1930.

On February 24, 1930, the plaintiff filed its request for findings of fact and conclusions of law and the defendant filed its motion to dismiss.

Pursuant to adjournment granted by the court when the case was submitted, the trial was continued and concluded on April 8, 1930, at which time decision was reserved and the plaintiff filed its amended request for findings of fact and the defendant filed its request for findings of fact and conclusions of law and motion for judgment.

Under date of June 11, 1930, the court handed down its written opinion adopting the agreed statement of facts herein as the findings of fact, deciding in favor of the defendant and against the plaintiff, and granting the motion for judgment on behalf of the defendant. On June 24, 1930, the court settled an order granting the motion for judgment on behalf of the defendant, theretofore submitted on the trial of the action, and adjudging that the defendant have judgment

against the plaintiff dismissing the action together with costs and disbursements thereof.

On August 13, 1930, the plaintiff filed its notice of exceptions and exceptions to conclusions of law, respectively.

On August 16, 1930, the court entered judgment herein in favor of the defendant and against the plaintiff dismissing the complaint herein on the merits, together with costs amounting to $20.00.

24 In United States District Court

[Title omitted.]

Agreed statement of facts

Now come plaintiff and defendant in the above-entitled cause, by their respective attorneys, whereupon it is stipulated and agreed that the facts hereinafter set forth shall be taken as true as though established by competent evidence taken in open court. Provided, however, that this stipulation shall be without prepudice to the right of either party to introduce further, competent and material evidence at the trial of this case not inconsistent with the facts herein stipulated to be taken as true.

It is requested by the parties hereto that the court, upon the decision of this case, separately state its findings of fact and conclusions of law.

1. This is a suit of a civil nature at common law and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is less than the sum of $10,000, and this suit and
25 the causes of action set forth in the complaint herein arise under the Constitution of the United States of America and the laws thereof providing for internal revenue.

2. Plaintiff is and at all times herein mentioned was a domestic corporation duly organized and existing under the laws of the State of New York pertaining to title and credit guarantee corporations, namely, Article V of the insurance law of said State of New York (Laws of 1892, chapter 690), its charter or certificate of incorporation having been duly filed in the office of the superintendent of insurance of the State of New York on or about April 5, 1906.

The plaintiff was organized, as aforesaid, with the name of Home Title Insurance Company of New York, but on or about April 15, 1921, its name was changed to Home Title Insurance Company.

A true and correct copy of plaintiff's said charter or certificate of incorporation, with all amendments thereto, is hereto attached and made part hereof as Exhibit A.

3. On or about December 13, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1922, and ending June 30, 1923, and the Commissioner of Internal Revenue thereafter audited said return and determined and found the sum of $1,392

as a capital stock tax liability of the plaintiff for said period, which sum he thereafter assessed.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York, at Brooklyn, New York, said sum of $1,392, which amount the United States has received from
26 said collector in the usual course of his official business and still retains.

Thereafter, plaintiff, on or about February 10, 1926, duly filed its claim for refund of $1,392 paid by the plaintiff as aforesaid. On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim and notified the plaintiff of such rejection by letter dated March 20, 1926, a true and correct copy of which is attached hereto and made a part hereof as Exhibit B.

True and correct copies of said capital stock tax return and of said claim for refund are attached hereto and made part hereof as Exhibits C and D, respectively.

4. On or about December 6, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1923, and ending June 30, 1924, a true and correct copy of which is attached hereto and made part hereof as Exhibit E.

Thereafter the Commissioner of Internal Revenue determined and assessed the sum of $1,850 as a capital stock tax liability of the plaintiff for the period beginning July 1, 1923, and ending June 30, 1924.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $1,850, which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $1,850 paid by the plaintiff as aforesaid, a true and correct copy of which is attached hereto and made a part hereof as
27 Exhibit F. On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim and notified the plaintiff of such rejection by letter dated March 20, 1926, a true and correct copy of which is attached hereto and made a part hereof as Exhibit G.

5. On or about September 18, 1924, plaintiff filed a capital stock tax return for the period beginning July 1, 1924, and ending June 30, 1925, a true and correct copy of which is attached hereto and made a part hereof as Exhibit H.

Thereafter the Commissioner of Internal Revenue determined and assessed the sum of $2,144 as a capital stock tax liability of the plaintiff for the period beginning July 1, 1924, and ending June 30, 1925.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $2,144 which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $2,144 paid by the plaintiff as aforesaid, a true and correct copy of which is attached hereto and made a part hereof as Exhibit I. On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim and notified the plaintiff of such rejection by letter dated March 20, 1926, a true and correct copy of which is attached hereto and made a part hereof as Exhibit J.

6. Plaintiff, since the date of its incorporation, has always been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York, and is, and
28 has always been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit guarantee corporations organized thereunder, and is, and has always been, required to file, and has filed annually with the said superintendent of insurance, on forms approved by him, the statements required by law for each year and as of December 31st of each year.

During the years 1921 to 1925, inclusive, as well as before and after that period, the plaintiff always complied with the insurance law of the State of New York and the regulations of the insurance department of said State.

It is agreed that the court may take judicial notice of said annual statements of plaintiff to said superintendent of insurance as published in his reports as though fully set forth herein.

True and correct copies of plaintiff's annual statements for each of the calendar years 1921 to 1923, inclusive, are set forth in Part III of the New York Insurance Reports for the years 1922 to 1924, respectively, duly made and published under the authority of section 46 of the insurance law of the State of New York.

In its said annual reports to the superintendent of insurance of the State of New York, the plaintiff reported its income, outgo, assets, liabilities, capital, surplus, guaranteed bonds and mortgages, guarantee fund and stock for each of the calendar years 1921 to 1923, inclusive, as follows:

29 *Income statements as reported in New York insurance reports*

	1921		1922		1923	
INCOME						
Premiums for title insurance	$29,090.65		$46,050.18		$67,136.82	
Premiums for mortgage guarantees	90,449.14	$119,539.79	105,750.03	$151,800.21	134,349.66	$201,488.48
Fees for:						
Searches	3,693.77		6,497.46		7,945.91	
Conveyances	13,544.25		26,008.93		27,775.00	
Examinations	479,420.46		733,752.80		813,048.88	
Sundry	4,153.09		5,234.03		7,349.20	
Old accounts collected	9,939.65		2,303.40		2,300.60	
		510,751.22		773,796.62		858,423.59
Interest earned on:						
Mortgage loans	51,840.98		83,942.74		111,040.94	
Bonds and stocks	14,216.05		6,780.08		215.21	
Bank deposits	4,341.45		5,454.26		7,754.72	
Real estate investment	102.39		3,617.08		5,021.57	
Sundry	1,570.00		2,536.50		3,035.50	
		72,070.87		102,330.66		127,067.94
Rents		−2,505.65		863.91		20,997.41
Profit on company's stock sold		850.00				
Gross profit on sale or maturity of:						
Real estate	3,342.47				11.45	
Mortgages						
Bonds	1,410.11		19.37			
Stocks			10.00		300.00	
		4,752.58		29.37		311.45
Decrease in reserve for taxes						8,205.95
Profit on second mortgages						138.30
Cash addition to surplus						
Total income		705,458.81		1,028,820.77		1,216,633.12
Surplus December 31 of preceding year		685,206.67		791,593.12		1,013,519.77
Total		1,390,665.48		1,820,413.89		2,230,152.89
30 OUTGO						
Losses incurred		861.71		2,841.87		7,509.50
Commissions or brokerage		41,078.21		59,751.30		82,641.80
Salaries, fees, and other charges of officers, directors, trustees, and office employees		281,963.78		374,142.80		515,479.01
Rents		15,836.02		21,283.77		24,061.21
Advertising	29,608.43		41,357.33		49,394.72	
Printing and stationery	9,610.91		12,413.80		10,914.28	
Furniture and fixtures	19,412.00		12,737.44		2,184.74	
Postage, telegrams, telephone, and express	6,044.06		7,717.72		9,168.90	
Miscellaneous office expenses	30,870.77		42,466.19		41,480.54	
		95,546.17		116,692.48		113,143.18
Legal expenses		2,724.11		10,331.53		14,188.21
Insurance department licenses and fees				54.03		
All other licenses, fees, and taxes:						
Federal corporations or income tax	27,242.06		48,274.37		52,627.75	
State tax on premiums	1,081.44		1,195.40		460.50	
Sundry	5,182.98		1,139.76		485.44	
		33,506.48		50,609.53		53,573.69
Interest charges incurred:						
Borrowed money	18,129.31		22,111.56			28,235.89
Mortgages	2,004.25		991.75			
		20,133.56		23,103.31		
Accounts charged off		6,090.21		4,654.59		4,982.54
Dividends to stockholders		76,500.00		97,500.00		120,000.00
Book values written off:						
Real estate		4,832.11		3,507.11		13,164.89
Reserve for taxes		20,000.00		5,000.00		
Reserve for losses				37,421.80		
Increase in contingent reserve						152,578.20
Increase in loss reserve						
Real estate expense						26,058.22
Gross loss on sale or maturity of bonds						375.00
Commission on sale of real estate						
Total outgo		599,072.36		806,894.12		1,156,101.34
Surplus end of year		791,593.12		1,013,519.77		1,074,051.55
Total		1,390,665.48		1,820,413.89		2,230,152.89

31 *Balance sheets (December 31) as reported in New York insurance reports*

	1921	1922	1923
ASSETS			
Market value of real estate	$255,098.50	$238,879.94	306,512.30
Mortgage loans	1,054,978.33	1,979,581.70	2,245,167.26
Market value of stocks	436,450.00	288,750.00	370,800.00
Cash in office	1,140.83	2,370.43	20,522.22
Deposit in banks	113,902.64	158,864.16	278,887.89
Fees receivable:			
Search	$1,473.88	$2,287.89	$2,904.80
Conveyances	115.00	215.00	245.00
Examinations	19,390.31	32,375.46	42,972.53
Sundry	2,519.14	2,773.71	2,231.89
	23,498.33	37,652.06	48,354.22
Interest due and accrued:			
Mortgage loans	12,028.26	17,314.63	33,424.23
Bank deposits	636.13		
	12,664.39		
Guaranteed interest due	5,365.37	10,366.93	
Accrued guaranteed interest receivable	330,749.66	432,884.81	548,637.62
Interest due and accrued on mortgages sold	8,319.99	13,014.49	
Documentary revenue stamps	400.00	400.00	2,000.00
Interest prepaid on loans	1,695.83	3,194.43	4,877.84
Total assets	2,242,263.87	3,183,273.58	3,858,243.68
32 LIABILITIES, CAPITAL, AND SURPLUS			
Borrowed money	150,000.00	400,000.00	800,000.00
Incumbrances on company's real estate	32,500.00		
Interest due and accrued	1,070.06	400.25	
Estimated amount of taxes hereafter payable based on business of year of this statement	50,000.00	55,000.00	46,794.05
Premiums, fees, or other items received in advance	28,867.83	33,102.27	54,835.09
Clients' money retained	71,860.54	129,442.57	129,695.22
Accrued guaranteed interest payable	313,832.32	401,536.92	485,781.74
Mortgages sold, not delivered	53,600.00	112,850.00	75,258.50
Interest on above accrued			590.91
Reserve for losses unadjusted		37,421.80	190,000.00
Salaries, expenses, bills, etc., due or accrued			1,227.62
Special trust account			
Subscriptions to new stock			
Total liabilities	701,670.75	1,169,753.81	1,784,192.13
Capital	750,000.00	1,000,000.00	1,000,000.00
Surplus Dec. 31	791,593.12	1,013,519.77	1,074,051.55
Total liabilities, capital, and surplus	2,243,263.87	3,183,273.58	3,858,243.68
Aggregate amount of bonds and mortgages outstanding December 31, payment of principal and interest of which has been guaranteed by this corporation	20,636,027.00	25,933,875.00	32,290,140.00
Sum set apart by company pursuant to requirements of section 176 of insurance law as a guarantee fund	547,100.00	744,000.00	678,000.00

	Par value	Book and market value	Par value	Book and market value	Par value	Book and market value
STOCKS OWNED						
Home Mortgage Investment Co., New York	$96,000.00	$144,000.00				
Hamilton National Bank, New York			$4,000.00	$7,200.00	$10,000.00	$15,000.00
Midwood Trust Co., Brooklyn, N. Y.	194,300.00	291,450.00	187,700.00	281,550.00	260,000.00	363,800.00
Total	290,300.00	435,450.00	191,700.00	288,750.00	270,000.00	378,800.00

33 7. Since its organization, including the years 1921 to 1925, inclusive, the plaintiff's business has consisted of the insurance of titles to real estate and the guaranteeing of real estate mortgages, and said business is and has at all times been carried on by the plaintiff as stated herein.

The plaintiff has at all times refused to guarantee any mortgage with respect to which it did not have full knowledge and over which it did not have complete control.

8. The practice of the plaintiff in the insurance of titles to real estate during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) The plaintiff issued policies of title insurance for which it received fixed charges, collected by plaintiff for each policy when issued, based on a scale dependent upon the amount of the policy. In this connection, solely as preliminary steps thereto, the plaintiff examined and prepared abstracts of titles, made searches and procured information, in relation thereto, to real estate and chattels real.

(2) A person, desiring a policy of title insurance, made written application to the plaintiff for such policy. The plaintiff thereafter made an investigation and search of the records pertaining to the title of the real estate and chattels real in question, and if the title was found to be insurable by the plaintiff, its policy of title insurance was issued as provided in said application. If such title was found by the plaintiff to be uninsurable, the plaintiff was, as provided in said application, reimbursed for its time and expenses in investigating said real estate title.

34 A true and correct copy of said application form for title insurance is attached hereto and made part hereof as Exhibit K.

The aforesaid policy of title insurance was embodied in a separate document, entitled "policy of title insurance," and a true and correct printed copy thereof is attached hereto and made a part hereof as Exhibit L.

9. The practice of the plaintiff in the guaranteeing of real estate mortgages during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) An applicant for this service would apply to the plaintiff for a first mortgage loan upon the applicant's property upon which the proposed mortgage was to be placed, and for such inspections, examinations, appraisals, and other acts as were necessary and incidental thereto, the applicant agreeing to pay plaintiff's charges for such examinations, inspections, appraisals, and other acts as were necessary and incidental thereto. A true and correct copy of said application form is hereto attached and made part hereof as Exhibit M.

(2) The plaintiff would then examine the title to the property involved, appraise the value of such property and make all necessary inspections, examinations, etc.

(3) If all matters were satisfactory, the plaintiff would prepare a bond and mortgage, securing the payment of the bond, and cause the same to be executed by the applicant and recorded.

(4) The plaintiff would thereupon pay to the applicant the face value of the bond, less the charges for its services, retaining
35 the bond and mortgage as security for the repayment of such advancement, together with the interest thereon.

(5) Since its organization, including the years 1921 to 1925, inclusive, the plaintiff has received from investors and others, principally savings banks and insurance companies, requests to purchase from the plaintiff mortgage loans, or participations therein, the payment of which was to be guaranteed by the plaintiff.

(6) Pursuant to said requests, the plaintiff would then issue a so-called policy of mortgage guarantee, which guaranteed the payment at maturity of the principal of the bond and a stated rate of interest, which was less than the rate of interest stipulated in the bond, and guaranteed the mortgage to be a valid first lien upon a good and marketable title in fee to the real estate upon which the mortgage was placed.

(7) The bond and mortgage, together with the so-called policy of mortgage guarantee, or certificates of participation therein, would then be sold by the plaintiff for the face value thereof, with the agreement that the plaintiff should collect the interest and principal of the bond and mortgage and should retain as compensation all interest collected in excess of the rate guaranteed by the plaintiff. This excess of interest received over interest guaranteed generally amounted to one-half of one per cent of the face amount of the bond and constituted the consideration received by the plaintiff for its said guarantee of the payment at maturity of the principal of said bond and the stated rate of interest.

(8) The aforesaid so-called policy of mortgage guarantee
36 was embodied in a separate document, entitled "mortgage guarantee," a true and correct printed copy of which is attached hereto and made part hereof as Exhibit N, and in the community generally known as a "policy." The consideration for it was expressed in the policy and was known in the community as a "premium."

(9) The aforesaid certificates of participation were embodied in separate documents, entitled "guaranteed first mortgage certificate," a true and correct specimen copy of which is attached hereto and made a part hereof as Exhibit O.

(10) The plaintiff sold substantially all mortgages soon after it acquired them. The average period during which it held mortgages before selling them has not exceeded two months. It has at no time had or sold any mortgages except those which it acquired and guaranteed as aforesaid.

The primary purpose of the plaintiff in making loans on bonds and mortgages has at no time been and is not for investment, but for the sale of the bonds and mortgages, guaranteed as aforesaid, to investors either by way of complete assignments of the bonds and mortgages or by way of guaranteed mortgage certificates.

(11) The gross income of the plaintiff for the calendar years 1921 to 1925, inclusive, as shown by its reports to the insurance department of the State of New York for the respective years, other than from interest, rentals, profit on sale of assets, and dividends, has been reallocated by the plaintiff as follows:

37	1921	1922	1923	1924	1925
(1) Income consisting of the difference between the interest received and guaranteed by plaintiff in connection with its mortgage guarantees	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.93
(2) Income from fees and charges attributable to mortgage guarantees, as hereinafter determined	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Income from fees and charges attributable to title insurance where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Income, arrived at as hereinafter indicated, consisting of the compensation and consideration received by the plaintiff for its agreement and undertaking, in its policies of mortgage guarantee, that the mortgage guaranteed is a valid first lien upon a good and marketable title in fee to the property covered by the mortgage, as shown in Exhibit N attached hereto	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Income from mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees collected	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches collected	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees collected	3,316.28	4,994.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys collected	392.45	326.80	569.20	1,339.65	1,993.25
(10) Total gross income of the plaintiff, exclusive of interest, rents, profit on plaintiff's stock sold, gross profit on sale or maturity of real estate, mortgages, bonds and stocks, decrease in reserve for taxes, profit on second mortgages and cash addition to surplus, as shown in New York Insurance Reports, Part III	630,291.01	925,596.83	1,059,912.07	1,160,895.92	1,420,509.85
(11) Deduct sum of items (1), (3), (5), (6), (7), (8) and (9) above	410,367.58	578,820.93	773,081.07	829,697.59	1,048,934.45
(12) Balance	219,923.50	346,775.90	286,831.00	331,198.33	371,575.40
(13) Less item (4) above, determined by the plaintiff as hereinafter explained	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(14) Balance, which constitutes item (2) above	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(15) Item (4) above is arrived at by taking 0.59677 of item (12) above, and in amount is	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05

38 The aforesaid 0.59677, shown in item (15) above, was calculated by the plaintiff upon the basis following:

As shown by Exhibits K and M attached hereto, all fees and charges which the plaintiff has at any time received from applicants for title insurance, specified in the application therefor (said Exhibit K), it has always, including the years 1921 to 1925, inclusive, received from all applicants for its mortgage guarantee service. The only additional fees and charges which the plaintiff has at any time received from applicants for its mortgage guarantee service, specified in the application therefor (said Exhibit M), consists of a fee for inspection and appraisal of the property. Said fees and charges which the plaintiff received during the years 1921 to 1925, inclusive, in connection with each policy of title insurance written by it, where the amount of the insurance was $5,000, amounted, in the aggregate, to approximately $74. Said fees and charges which the plaintiff received during the years 1921 to 1925, inclusive, in connection with each policy of mortgage guarantee written by it, where the amount of the loan was $5,000, consisted of said $74 and an additional charge of approximately $50 for inspection and appraisal of the property, or a total of $124. The ratio which said $74 is to said $124, to wit, 0.59677, is the factor used by the plaintiff in item (15) above.

Dwight Comstock is, and since before 1921 has been, vice-president and treasurer of the plaintiff. F. G. Nash is, and since before 1921 has been, assistant treasurer of the plaintiff. Each of said officers has and at all times during the years 1921 to 1925, inclusive, had

39 personal knowledge of the fees and charges received by the plaintiff from applicants for plaintiff's title insurance and applicants for its mortgage guarantee service, respectively, and based upon his said personal knowledge and experience, each of plaintiff's said officers has, in accordance with the aforesaid method by which the factor used in item (15) above was arrived at, bona fide estimated that of the income shown in item (12) above for each of the years 1921 to 1925, inclusive, not less than 0.59677 thereof consisted of the income described in item (4) above.

12. The plaintiff duly filed its income tax returns, including certain schedules attached thereto, for the calendar years 1921 to 1925, inclusive, with the collector of internal revenue for the first district of New York at Brooklyn, New York, true and correct copies of which are attached hereto and made a part hereof as Exhibits P, Q, R, S, and T, respectively.

13. The amount of title insurance written by the plaintiff, where the plaintiff did not make the mortgage loans and did not guarantee the mortgages involved, and the amount of mortgages guaranteed by the plaintiff for each of the calendar years 1921 to 1925, inclusive, were as follows:

Year	Title insurance written, where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	Mortgages guaranteed
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

14. The aggregate amount of title insurance, where the plaintiff did not make the mortgage loans and did not guarantee the
40 mortgages involved, outstanding during each of the years 1921 to 1925, inclusive, was not less than $100,000,000.

15. On or about April 1, 1924, plaintiff filed a certain claim for abatement, a true and correct copy of which is attached hereto and made a part hereof as Exhibit U.

Under date of January 13, 1925, the Commissioner of Internal Revenue addressed a letter to the plaintiff, a true and correct copy of which is attached hereto and made a part hereof as Exhibit V.

Under date of January 27, 1925, the plaintiff addressed a letter to the Commissioner of Internal Revenue, a true and correct copy of which is attached hereto and made a part hereof as Exhibit W.

Under date of February 12, 1925, the Commissioner of Internal Revenue addressed a letter to the plaintiff, a true and correct copy of which is attached hereto and made a part hereof as Exhibit X.

Under date of March 4, 1925, the plaintiff addressed a letter to the Commissioner of Internal Revenue, a true and correct copy of which is attached hereto and made a part hereof as Exhibit Y.

On or about December 16, 1925, the Commissioner of Internal Revenue denied plaintiff's aforesaid claim in abatement by letter of that date, referred to in Exhibits B, G, and J, respectively, a true and correct copy of which letter is hereto attached and made a part hereof as Exhibit YY.

16. At none of the times material in this action were the plaintiff's assets segregated or earmarked in anyway for investment purposes or otherwise, all of its assets and all of its capi-
41 tal, surplus, and undivided profits being employed indiscriminately in its business activities; plaintiff has always maintained a guarantee fund pursuant to the provisions of Article V of the New York insurance law; all of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund; plaintiff's investments of the classes required for said fund always exceeded the amount required by said statute; and no investments were segregated by the plaintiff as being

a part of a guarantee fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements.

17. Plaintiff, during the periods here in question, made no segregation on its books of account of the expenses incurred by it as between that portion of its business above described as the insurance of titles and that portion of its business above described as the guaranteeing of mortgages.

18. A copy of plaintiff's by-laws in effect during the calendar years 1921, 1922, and 1923 is attached hereto and made part hereof as Exhibit Z.

19. Two corporations, to wit, Guaranteed Mortgage Company, 345 Madison Ave., New York City, and First Mortgage Guaranty Company, Long Island City, New York, each incorporated under the banking law of the State of New York and making its report to, and being under the supervision of, the superintendent of banks of said State of New York, were during the periods here in questions engaged in the business of making mortgage loans and selling mortgages, and participations therein, in part with and in part
42 without their guarantee. True and correct specimen copies of the instruments employed by each of these companies corresponding to Exhibit N "mortgage guarantee," and Exhibit O "guaranteed first mortgage certificate" employed by plaintiff, are attached hereto and made a part hereof as Exhibits 1, 2, 3, 4, and 5. The title to the property covered by the mortgages and participations therein, at any time made or sold by each of the said companies was and is, if insured, insured to said respective companies by other companies, to wit, title insurance companies. The title to the property covered by the mortgages, and participations therein, made or sold by the plaintiff at any time, including the years 1921 to 1925, was not and is not insured to the plaintiff or mortgagor by any other company or person.

20. The plaintiff is and always has been the sole owner of the aforesaid claims and has not transferred or assigned any of them or any part thereof or interest therein, and has at all times borne true allegiance to the Government of the United States and has in no way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Dated, February 21, 1930.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.
HOWARD W. AMELI,
United States Attorney,
Attorney for the United States of America.
By ALBERT D. SMITH,
Asst. U. S. Atty.

43 In United States District Court, Eastern District of New York

L-3547. June 11, 1930.

HOME TITLE INSURANCE COMPANY, PLAINTIFF
against
UNITED STATES OF AMERICA, DEFENDANT

Weill, Wolff & Satterlee, Esqs., for the plaintiff (Hugh Satterlee and I. Herman Sher, Esqs., of counsel).

Howard W. Ameli, Esq., for the defendant (Albert D. Smith, Esq., assistant United States attorney; C. M. Charest, Esq., General Counsel Bureau of Internal Rvenue; E. H. Horton, Esq., attorney, Bureau of Internal Revenue, of counsel).

Opinion of the court

GALSTON, D. J.:

This case is presented upon an agreed state of facts.

There are three causes of action set forth in the complaint, each involving the same principle of law. The plaintiff seeks to recover from the defendant in each case a sum of money alleged erroneously to have been collected by the collector of internal revenue for
44 the first district of New York from the plaintiff under protest, and alleges exemptions of capital-stock tax liability under section 1000 of the 1921 act so far as the first and second causes of action are concerned, and under section 700 of the 1924 act as to the third cause of action.

The ground of recovery contended is that by virtue of section 246 of the revenue act of 1921 and sections 243 to 246 of the revenue act of 1924, the plaintiff as an insurance company was not subject to the imposition of any capital-stock tax.

Essentially and basically the question for determination is whether the plaintiff company is an insurance company within the meaning of the revenue acts in question. If the answer to that question is in the affirmative then the plaintiff is entitled to the relief which it seeks herein.

The term "insurance company" is not defined in either statute. Recourse, therefore, must be had to such provisions of the statute, if any, as may disclose the intention of Congress in that regard.

Section 1000 of the revenue act of 1921, provides:

"Sec. 1000. (a) (42 Stat. 295). That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the revenue act of 1918;

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess

of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * * * *

45 "Sec. 1000 (b) (42 Stat. 295). The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section 246."

It is to be noted that the capital-stock tax thus defined shall not apply "to any insurance company *subject to the tax imposed by section* * * * 246." (Italics mine.) Thus apparently not all so-called insurance companies but only such as are "subject to the tax imposed by section * * * 246" are to be relieved from the capital-stock tax.

Section 246 referred to reads as follows:

"Sec. 246. (42 Stat. 262) (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

"(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

"(2) In the case of such a foreign insurance company the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230.

"(b) In the case of an insurance company subject to the tax imposed by this section:

"(1) The term 'gross income' means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the
46 annual statement approved by the National Convention of Insurance Commissioners;

"(2) The term 'net income' means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

"(3) The term 'invested income' means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

"To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

"(4) The term 'underwriting income' means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred.

"(5) The term 'premiums earned on insurance contracts during the taxable year' means an amount computed as follows:

"From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

"(6) The term 'losses incurred' means losses incurred during the taxable year on insurance contracts, computed as follows:

"To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained
47 add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

"(7) The term 'expenses incurred' means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

"To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by section 247."

Sections 247 and 230 referred to therein are as follows:

"Sec. 247. (42 Stat. 263) (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions:

"(1) All ordinary and necessary expenses incurred, as provided in paragraph (1) of subdivision (a) of section 234;

"(2) All interest as provided in paragraph (2) of subdivision (a) of section 234;

"(3) Taxes as provided in paragraph (3) of subdivision (a) of section 234;

"(4) Losses incurred;

"(5) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;
48 "(6) The amount received as dividends from corporations as provided in paragraph (6) of subdivision (a) of section 234;

"(7) The amount of interest earned during the taxable year which under paragraph (4) of subdivision (b) of section 213 is exempt

from taxation under this title, and the amount of interest allowed as a credit under subdivision (a) of section 236;

"(8) A reasonable allowance, for the exhaustion, wear and tear of property, as provided in paragraph (7) of subdivision (a) of section 234;

"(9) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $2,000; but if the net income is more than $25,000 the tax imposed by section 246 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000.

"(b) In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in subdivision (b) of section 234.

"(c) Nothing in this section or in section 246 shall be construed to permit the same item to be twice deducted."

The provisions of the revenue act of 1924 are identical in principal though somewhat different in other respects.

It is thus seen that the issue is narrowed to the question as to whether the plaintiff is an "insurance company subject to the tax imposed by section * * * 246," or is it, for the purposes of the revenue acts, an ordinary corporation.

What is the nature of the plaintiff's business? It was
49 organized under article 5 of the insurance law of the State of New York (Laws of 1892, chapter 690) and filed its certificate of incorporation in the office of the superintendent of insurance of the State of New York on or about April 5th, 1906. It has since the date of its incorporation been subject to the examination and supervision of the superintendent of insurance of the State of New York and has filed annual reports with the superintendent of insurance of the State of New York. Its business has consisted in the insurance of titles to real estate and in the guaranteeing of real estate mortgages. In respect to its title insurance business, it may be said that plaintiff issued policies of title insurance after having examined and prepared abstracts of the titles in relation to real estate and chattels real. It is not with respect to that department of the plaintiff's business that controversy is raised, but rather as to the other functions exercised in the guaranteeing of real estate mortgages.

In conducting this mortgage guaranty business, plaintiff's practice requires an applicant for such guaranteed mortgage to apply for a first mortgage loan upon the applicant's property, and for such inspections, examinations, appraisal, and other acts as are necessary and incidental thereto. The applicant agrees to pay the plaintiff's charges for such services. Then follows in due course the preparation by the plaintiff of a bond and a mortgage to be executed by the applicant. The plaintiff pays the applicant the face value of the

bond less its charges for its services, retaining the bond and the mortgage as security for the repayment of the loan. The bond and the mortgage are then sold by the plaintiff for the face value thereof.

At the same time the plaintiff delivers to the purchaser a
50 policy of mortgage guaranty. The terms of the policy guarantee the payment of the principal of the bond at maturity, interest to be paid periodically, but at a rate lower than that stipulated in the bond, and guarantee the mortgage to be a valued first lien upon a good and marketable title in fee to the real estate in question. The plaintiff is required also to collect the interest and principal of the bond and the mortgage under the agreement, retaining as compensation for its guaranty all interest collected in excess of the rate guaranteed by the plaintiff. This excess of interest generally is one-half of one per cent of the face amount of the bond. It is the practice of the plaintiff soon after the acquisition of these mortgages to sell them at an average period of within two months from acquisition.

From the agreed state of facts it appears that a substantial part of the business carried on by the plaintiff consisted of the sale of guaranteed mortgages. It is the contention of the defendant that in such circumstances, since the guaranteeing of real estate mortgages is not insurance, a corporation engaged in such business is not entitled to be classed as an insurance company for purposes of Federal taxation under the provisions of sections 246 and 247 of the revenue acts of 1921 and 1924.

What did Congress intend? By section 230 of the revenue act of 1921 (42 Stat. 252), Congress imposed an income tax upon the net income of every corporation based upon its gross income "from whatever source derived" (sec. 213–A; 42 Stat. 238). Sections 246 and 247 make those latter sections inapplicable to insurance companies. The exception, therefore, must be strictly construed. United States v. Dixon, 15 Pet. 141; Bank of Commerce v. Tennessee, 161 U. S. 134.

51 The defendant argues in brief that the income of an ordinary insurance company derived from its business of making and selling insurance contracts, consists of its premium income (resulting from the issuance of its policies), and secondly, its investment income (derived from investment of its capital, surplus and undivided profits). These two classes of income are indeed the "gross income" of an insurance company as defined in section 246.

If, now the provisions of section 247 are analyzed, it is found that in computing the "net income of an insurance company subject to the tax imposed by section 246," only such deductions are permitted as represent losses and expenses incurred in the production of the gross income defined in section 246. It would seem, therefore, that Congress did not intend by sections 246 and 247 to exempt from taxation any income not classified as the income of an insurance

company under said section 246. The inference drawn by the Government then is that since a substantial part of the income of the plaintiff is neither premium income nor investment income, it is not that kind of income which Congress has made characteristic or typical or indeed the income of an insurance company. The Government's syllogism might be stated thus:

"All insurance companies (under the revenue acts) are those, the sole income of which consists of premium income and investment income.

"Plaintiff company is not one, the sole income of which consists of premium and investment income.

"Therefore, the plaintiff is not an insurance company such as Congress intended to relieve from the payment of the capital stock tax."

52 Reasonableness is given to this conclusion, the defendant argues, because Congress did not intend that any income not classified as the income of an insurance company (i. e., premium income and investment income) should be exempt from taxation.

A similar situation as that involved herein is reported in Louisville Title Company v. Lucas, 27 Fed. (2d) 413. In that case the plaintiff was engaged in the dual business of insuring titles to real estate and of selling and guaranteeing mortgages. It was said:

"Congress was undoubtedly undertaking, in section 246, to provide for the taxation of all of the income of insurance companies subject to its provisions. In so doing it provided for the taxation of only that income ordinarily understood to be enjoyed by insurance companies, viz., premium income and incidental income, flowing from the investment of its capital and surplus. If it had been the intention of Congress to give these companies which were conducting not only an insurance business, but also some separate and distinct business, the benefit of section 246, undoubtedly provision would have been made for reporting and taxing the income derived from such separate and distinct business. To assume otherwise would be to impute to Congress a deliberate intention to exempt the income of some businesses from taxation altogether, simply because they were conducted by a corporation also engaged in the insurance business.

"I think, therefore, we must conclude that if an insurance company, in addition to its insurance business, conducts a separate and distinct business, from which it obtains a substantial income, it is not subject to taxation under section 246, nor exempt from taxation under section 1000."

53 The court then stated that the mortgage sale department or business of the Louisville Title Company was wholly distinct from its title insurance business, and added:

"Of course, a guaranty of the payment of the obligation of another, according to the terms thereof, is not an insurance contract

any more than is the endorsement of a negotiable instrument an insurance contract."

A "guaranty" is defined to be a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who in the first instance was liable for such payment or performance (4 Words and Phrases 3179, and cases therein cited).

In this respect it differs from insurance, which is a contract involving a direct, not an indirect, obligation. A contract of insurance is a personal contract of indemnity between the insured and the underwriter. The contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred. Northern Trust Co. v. Snyder, 76 Fed. 34.

Plaintiff's contract of guaranty certainly falls within the former class and not the latter. It obligates the plaintiff to pay the full amount of the principal and interest upon default of the mortgagor and not merely to indemnify the holder of the mortgage to the extent of a loss that might be sustained by him. It follows that such of plaintiff's income as is derived from its business of guaranteeing real estate mortgages should not be exempt from taxation, and yet it would be if plaintiff were held to be an insurance company within the intent and meaning of the revenue acts in question, for such income is neither investment income nor underwriting income as defined in section 246.

54 It may be said in conclusion that the mere fact that the plaintiff has a charter from the State of New York, which permits it to do an insurance business, does not make it an insurance company within the meaning of section 246. Louisville Title Company v. Lucas, 27 Fed. (2d) 413.

The findings of fact will be the stipulated facts.

The motion for judgment on behalf of the defendant is granted.

CLARENCE G. GALSTON,
U. S. D. J.

In United States District Court

[Title omitted.]

Plaintiff's request for findings

February 24, 1930

The plaintiff respectfully requests that the court adopt the agreed statement of facts herein as its findings of fact and make the following conclusions of law:

1. During the taxable years ended June 30, 1923 and 1924, the plaintiff was, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

55 2. During the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

3. During the taxable years ended June 30, 1923, and 1924, the plaintiff was not subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

4. During the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

5. The capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was erroneously and illegally assessed and collected, and the plaintiff is entitled to recover said sum from the defendant, with interest from February 4, 1926.

6. The capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was erroneously and illegally assessed and collected, and the plaintiff is entitled to recover said sum from the defendant, with interest from February 4, 1926.

7. The capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was erroneously and illegally assessed and collected, and the plaintiff is entitled to recover said sum from the defendant, with interest from February 4, 1926.

Respectfully submitted.

WEILL, WOLFF & SATTERLEE,
Attorneys for the Plaintiff.

56 In United States District Court

[Title omitted.]

Amended request for findings of fact

Filed April 8, 1930

The plaintiff, considering the facts hereinafter set forth to be proven and deeming them material to the due presentation of this case in the findings of fact, requests the court to find them as follows (the references to articles are to articles of the agreed statement of facts; and the references to exhibits are to exhibits attached to the agreed statement of facts and incorporated therein by reference):

1. This is a suit of a civil nature at common law and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is less than the sum of $10,000, and this suit and the causes of action set forth in the complaint herein arise under the Constitution of the United States of America and the laws thereof providing for internal revenue. (Article 1.)

57 2. Plaintiff is and at all times herein mentioned was a domestic corporation duly organized and existing under the

laws of the State of New York pertaining to title and credit guarantee corporations, namely Article V of the insurance law of said State of New York (Laws of 1892, chapter 690), its charter or certificate of incorporation having been duly filed in the office of the superintendent of insurance of the State of New York on or about April 5, 1906.

The certificate of incorporation of the plaintiff states in part as follows:

"First: That the name of the proposed corporation is 'Home Title Insurance Company of New York.'

"Second: It is to be a title guaranty corporation and the purposes for which it is to be formed are as provided in and by section one hundred and seventy, subdivision one, of the insurance law of New York State."

On or about April 15, 1921, the plaintiff's name was duly changed to Home Title Insurance Company.

(Article 2; Exhibit A.)

3. On or about December 13, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1922, and ending June 30, 1923, and the Commissioner of Internal Revenue thereafter audited said return and determined and found the sum of $1.392 as a capital stock tax liability of the plaintiff for said period, which sum he thereafter assessed.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal rev-
58 enue for the first district of New York at Brooklyn, New York, said sum of $1,392, which amount the United States has received from said collector in the usual course of his official business and still retains.

Thereafter, plaintiff, on or about February 10, 1926, duly filed its claim for refund of the $1,392 paid by the plaintiff as aforesaid, for the reasons stated in said claim as follows:

"That the above company being an insurance company is not liable for a capital stock tax."

On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim.

(Article 3; Exhibit D.)

4. On or about December 6, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1923, and ending June 30, 1924. Thereafter the Commissioner of Internal Revenue determined and assessed the sum of $1,850 as a capital stock tax liability of the plaintiff for said period.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $1,850, which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $1,850 paid by the plaintiff as aforesaid, for the reasons stated in said claim as follows:

59 "That the above company being an insurance company is not liable for a capital-stock tax."

On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim.

(Article 4; Exhibit F.)

5. On or about September 18, 1924, plaintiff filed a capital-stock tax return for the period beginning July 1, 1924, and ending June 30, 1925. Thereafter, the Commissioner of Internal Revenue determined and assessed the sum of $2,144 as a capital-stock tax liability of the plaintiff for said period.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $2,144, which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $2,144 paid by the plaintiff as aforesaid, for the reason stated in said claim as follows:

"That the above company being an insurance company is not liable for a capital-stock tax."

On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim.

(Article 5; Exhibit I.)

6. Plaintiff, since the date of its incorporation, has always

60 been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York, and is, and has always been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit guarantee corporations organized thereunder, and is, and has always been, required to file, and has filed annually with the said superintendent of insurance, on forms approved by him, the statements required by law for each year and as of December 31st of each year.

During the years 1921 to 1925, inclusive, as well as before and after that period, the plaintiff always complied with the insurance law of the State of New York and the regulations of the insurance department of said State.

In its said annual reports to the superintendent of insurance of the State of New York the plaintiff reported its income, outgo, assets, liabilities, capital, surplus, guaranteed bonds and mortgages, guarantee fund and stock for each of the calendar years 1921 to 1925, inclusive, as follows:

	1921		1922		1923		1924		1925	
INCOME										
Premiums for title insurance	$29,090.65		$46,050.18		$67,138.82		$69,442.53		$87,965.58	
Premiums for mortgage guarnatees	90,449.14		105,750.03		134,349.66		175,641.39		227,869.93	
		$119,539.79		$151,800.21		$201,488.48		$245,083.92		$315,835.51
Fees for:										
Searches	3,693.77		6,497.46		7,945.91		11,398.30		14,749.09	
Conveyances	13,544.25		26,008.93		27,779.00		33,668.40		35,340.67	
Examinations	479,420.46		733,752.80		813,048.88		861,675.77		1,042,461.83	
Sundry	4,153.09		5,234.03		7,349.20		8,309.90		11,151.30	
Old accounts collected	9,939.65		2,303.40		2,300.60		759.63		971.45	
		510,751.22		773,796.62		858,423.59		915,812.00		1,104,674.34
Interest earned on:										
Mortgage loans	51,840.98		83,942.74		111,040.94		131,930.59		153,313.76	
Bonds and stocks	14,216.05		6,780.08		215.21		7,800.00		15,632.07	
Bank deposits	4,341.45		5,464.26		7,754.72		8,540.57		10,087.27	
Real estate investment	102.39		3,617.08		5,021.57		4,740.00		4,216.07	
Sundry	1,570.00		2,536.50		3,035.50		3,162.69		5,814.73	
		72,070.87		102,330.66		127,067.94		156,173.85		189,063.90
Rents		−2,505.65		863.91		20,997.41		35,000.03		12,108.23
Profit on company's stock sold		850.00								
Gross profit on sale or maturity of:										
Real estate	3,342.47				11.45		7,089.20		38,500.00	
Mortgages							218.63		422.00	
Bonds	1,410.11		19.37							
Stocks			10.00		300.00					
		4,752.58		29.37		311.45		7,307.83		38,922.00
Decrease in reserve for taxes						8,205.95		10,395.10		
Profit on second mortgages						138.30				
Cash addition to surplus								1,050.00		450.00
Total income		705,458.81		1,028,820.77		1,216,633.12		1,370,822.73		1,661,054.28
Surplus December 31 of preceding year		685,206.67		791,593.12		1,013,519.77		1,074,051.55		1,181,037.08
Total		1,390,665.48		1,820,413.89		2,230,152.89		2,444,874.28		2,842,091.36

Income statement—Continued

52 OUTGO	1921		1922		1923		1924		1925	
Losses incurred		$861.71		$2,841.87		$7,599.50		$158,535.88		$89,966.79
Commissions or brokerage		41,078.21		59,751.30		82,641.80		82,827.94		95,816.79
Salaries, fees and other charges of officers, directors, trustees and office employees		281,963.78		374,142.80		515,479.01		587,004.59		718,124.33
Rents		15,836.02		21,283.77		24,081.21		30,507.79		39,422.03
Advertising	$29,608.43		$41,357.33		$49,394.72		$41,655.55		$28,501.50	
Printing and stationery	9,610.91		12,413.80		10,914.28		11,281.82		15,087.44	
Furniture and fixtures	19,412.00		12,737.41		2,184.74		1,805.53		3,529.94	
Postage, telegrams, telephone and express	6,044.06		7,717.72		9,168.90		11,262.77		13,294.13	
Miscellaneous office expenses	30,870.77		42,466.19		41,480.54		48,368.81		47,589.79	
		95,546.17		116,692.48		113,143.18		114,374.48		108,002.80
Legal expenses		2,724.11		10,331.53		14,188.21		3,383.54		1,566.52
Insurance department licenses and fees				54.03						125.00
All other licenses, fees and taxes:										
Federal corporations or income tax	27,242.06		48,274.37		52,627.75		46,746.32		69,349.92	
State tax on premiums	1,081.44		1,195.40		460.50		2,014.88		2,550.84	
Sundry	5,182.98		1,139.76		485.44		521.10		40.83	
		33,506.48		50,609.53		53,573.69		49,282.30		71,841.59
Interest charges incurred:										
Borrowed money	18,129.31		22,111.56			28,235.89		28,805.88		29,621.31
Mortgages	2,004.25		991.75							
		20,133.56		23,103.31						
Accounts charged off		6,090.21		4,654.59		4,982.54		8,171.96		6,438.40
Dividends to stockholders		76,500.00		97,500.00		120,000.00		142,500.00		150,000.00
Book values written off:										
Real estate		4,832.11		3,507.11		13,164.89		4,800.00		4,794.61
Reserve for taxes		20,000.00		5,000.00						
Reserve for losses				37,421.80						
Increase in contingent reserve						152,578.20				
Increase in loss reserve								10,000.00		45,574.00
Real estate expense						26,058.22		42,992.84		
Gross loss on sale or maturity of bonds						375.00				
Commission on sale of real estate								650.00		
Total outgo		599,072.36		806,894.12		1,156,101.34		1,263,837.20		1,361,294.17
Surplus end of year		791,593.12		1,013,519.77		1,074,051.55		1,181,037.08		1,480,797.19
Total		1,390,665.48		1,820,413.89		2,230,152.89		2,444,874.28		2,843,091.36

	1921		1922		1923		1924		1925	
ASSETS										
Market value of real estate		$255,098.50		$238,879.94		$305,512.30		$310,794.61		$523,461.75
Mortgage loans		1,054,978.33		1,979,581.70		2,245,167.26		2,035,801.94		2,913,507.27
Market value of stocks		435,450.00		288,750.00		370,860.00		370,860.00		385,860.00
Cash in office		1,140.83		2,370.43		20,522.32		2,717.16		13,208.47
Deposits in banks		113,902.64		158,864.16		278,887.89		348,531.85		382,724.01
Fees receivable:										
Search	$1,473.88		$2,287.89		$2,904.80		$3,045.75		$4,616.91	
Conveyances	115.00		215.00		245.00		690.00		285.00	
Examinations	19,390.31		32,375.46		42,972.53		41,225.25		63,225.97	
Sundry	2,519.14		2,773.71		2,231.89		1,266.44		2,168.00	
		23,498.33		37,652.06		48,354.22		46,227.44		70,295.88
Interest due and accrued:										
Mortgage loans	12,028.26			17,314.63		33,424.23	41,029.56			43,667.22
Bank deposits	636.13						525.00			
		12,664.39						41,554.56		
Guaranteed interest due		5,365.37		10,366.93						
Accrued guaranteed interest receivable		330,749.66		432,884.81		548,637.62		669,675.20		813,010.13
Interest due and accrued on mortgages sold		8,319.99		13,014.49						
Documentary revenue stamps		400.00		400.00		2,000.00		2,000.00		2,100.00
Interest prepaid on loans		1,696.83		3,194.43		4,877.84		522.23		3,796.13
Accounts receivable								9,360.41		30,516.35
Total assets		2,243,263.87		3,183,273.58		3,858,243.68		3,838,045.40		5,182,144.21

Balance sheets—December 31—Continued

	1921	1922	1923	1924	1925
64 LIABILITIES, CAPITAL, AND SURPLUS					
Borrowed money	$150,000.00	$400,000.00	$800,000.00	$200,000.00	$775,000.00
Incumbrances on company's real estate	32,500.00				46,500.00
Interest due and accrued	1,070.06	400.25			2,607.05
Estimated amount of taxes hereafter payable based on business of year of this statement	50,000.00	55,000.00	46,794.05	36,398.95	66,742.12
Premiums, fees, or other items received in advance	28,867.83	33,102.27	54,835.09	62,370.15	66,297.36
Clients' money retained	71,800.54	129,442.57	129,695.22	178,769.66	212,458.63
Accrued guaranteed interest payable	313,832.32	401,536.92	485,781.74	590,519.39	718,872.08
Mortgages sold, not delivered	53,600.00	112,850.00	75,258.50	91,004.49	108,592.30
Interest on above accrued			599.91	483.01	1,469.15
Reserve for losses unadjusted		37,421.80	190,000.00	200,000.00	245,574.00
Salaries, expenses, bills, etc., due or accrued			1,227.62	3,525.38	5,529.33
Special trust account				43,837.29	
Subscriptions to new stock					201,710.00
Total liabilities	701,670.75	1,169,753.81	1,784,192.13	1,407,008.32	2,451,347.02
Capital	750,000.00	1,000,000.00	1,000,000.00	1,250,000.00	1,250,000.00
Surplus Dec. 31	791,593.12	1,013,519.77	1,074,051.55	1,181,037.08	1,480,797.19
Total liabilities, capital and surplus	2,243,263.87	3,183,273.58	3,858,243.68	3,838,045.40	5,182,144.21
GENERAL INTERROGATORIES					
Aggregate amount of bonds and mortgages outstanding Dec. 31, payment of principal and interest of which has been guaranteed by this corporation	20,636,027.00	25,933,875.00	32,290,140.00	40,305,474.00	48,500,968.00
Sum set apart by company pursuant to requirements of sec. 176 of insurance law as a guarantee fund	547,100.00	744,000.00	678,000.00	910,000.00	925,000.00

	Par value	Book and market value	Par value	Book and market value	Per value	Book and market value	Par value	Book and market value	Par value	Book and market value
STOCKS OWNED										
Banks, trust and insurance companies (United States)	$194,300.00	$291,450.00	$191,700.00	$288,750.00	$270,000.00	$370,860.00	$270,000.00	$370,860.00	$275,000.00	$383,360.00
Industrial and miscellaneous (United States)	96,000.00	144,000.00							2,500.00	2,500.00
Total	290,300.00	435,450.00	191,700.00	288,750.00	270,000.00	370,860.00	270,000.00	370,860.00	277,500.00	385,860.00

65 (Article 6; Part III of New York Insurance Reports for the years 1922 to 1926, inclusive.)

7. Since its organization, including the years 1921 to 1925, inclusive, the plaintiff's business has consisted of the insurance of titles to real estate and the guaranteeing of real estate mortgages, and said business is and has at all times been carried on by the plaintiff as stated herein.

The plaintiff has at all times refused to guarantee any mortgage with respect to which it did not have full knowledge and over which it did not have complete control.

(Article 7.)

8. The practice of the plaintiff in the insurance of titles to real estate during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) The plaintiff issued policies of title insurance for which it received fixed charges, collected by plaintiff for each policy when issued, based on a scale dependent upon the amount of the policy. In this connection, solely as preliminary steps thereto, the plaintiff examined and prepared abstracts of titles, made searches and procured information, in relation thereto, to real estate and chattels real.

(2) A person, desiring a policy of title insurance, made written application to the plaintiff for such policy. The plaintiff thereafter made an investigation and search of the records pertaining to the title of the real estate and chattels real in question, and if the title was found to be insurable by the plaintiff its policy of title insurance was issued as provided in said application. If such title
66 was found by the plaintiff to be uninsurable, the plaintiff was, as provided in said application, reimbursed for its time and expenses in investigating said real estate title.

(3) The aforesaid policy of title insurance was embodied in a separate document, entitled "policy of title insurance," and therein the plaintiff insured against all loss or damage sustained by reason of any defect or defects of the title affecting the premises covered by the policy, or affecting the interests of the insured therein, or by reason of unmarketability of the title of the insured to or in said premises, or by reason of liens or incumbrances charging the same at the date of the policy.

(Article 8; Exhibits K and L.)

9. The practice of the plaintiff in the guaranteeing of real estate mortgages during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) An applicant for this service would apply to the plaintiff for a first mortgage loan upon the applicant's property upon which the proposed mortgage was to be placed; for the insurance of the title to such property; for the examination of the title; and for such other inspections, examinations, appraisals and other acts as were necessary and incidental thereto, the applicant agreeing to pay

plaintiff's charges for such title insurance, examinations, inspections, appraisals and other acts necessary and incidental thereto.

(2) The plaintiff would then examine the title to the property involved, appraised the value of such property and make all necessary inspections, examinations, etc.

67 (3) If all matters were satisfactory, the plaintiff would prepare a bond and mortgage, securing the payment of the bond, and cause the same to be executed by the applicant and recorded.

(4) The plaintiff would thereupon pay to the applicant the face value of the bond, less the charges for its services, retaining the bond and mortgage as security for the repayment of such advancement, together with the interest thereon.

(5) Since its organization, including the years 1921 to 1925, inclusive, the plaintiff has received from investors and others, principally savings banks and insurance companies, requests to purchase from the plaintiff mortgage loans, or participations therein, the payment of which was to be guaranteed by the plaintiff.

(6) Pursuant to said requests, the plaintiff would then issue a policy of mortgage guarantee, which guaranteed the payment at maturity of the principal of the bond and a stated rate of interest which was less than the rate of interest stipulated in the bond, and guaranteed the mortgage to be a valid first lien upon a good and marketable title in fee to the real estate upon which the mortgage was placed.

(7) The bond and mortgage, together with the policy of mortgage guarantee, or certificates of participation therein, would then be sold by the plaintiff for the face value thereof, with the agreement that the plaintiff should collect the interest and principal of the bond and mortgage and should retain as compensation all interest collected in excess of the rate guaranteed by the plaintiff. This excess of interest received over interest guaranteed generally amounted to one-half of one per cent of the face amount of

68 the bond and constituted the consideration received by the plaintiff for its said guarantee of the payment at maturity of the principal of said bond and the stated rate of interest.

(8) The aforesaid policy of mortgage guarantee was embodied in a separate document, entitled "mortgage guarantee," and in the community generally was known as a "policy." The consideration for it was expressed in the policy and was known in the community as a "premium."

(9) The aforesaid certificates of participation were embodied in separate documents, entitled "guaranteed first mortgage certificate."

(Article 9; Exhibits M, N, and O.)

10. The plaintiff sold substantially all mortgages soon after it acquired them. The average period during which it held said mortgages before selling them has not exceeded two months. It has at no time had or sold any mortgages except those which it acquired and guaranteed as aforesaid.

The primary purpose of the plaintiff in making loans on bonds and mortgages has at no time been and is not for investment, but for the sale of the bonds and mortgages, guaranteed as aforesaid, to investors either by way of complete assignments of the bonds and mortgages or by way of guaranteed mortgage certificates.

(Article 10.)

11. All fees and charges which the plaintiff has at any time received from applicants for title insurance, specified in the application therefor and consisting of fees and charges for examination of the title, conveyancing, survey, tax search, and disbursements for recording fees, recording tax and Federal tax, it has always, including the years 1921 to 1925, inclusive, received from all applicants for its mortgage guarantee service. The only additional fees and charges which the plaintiff has at any time received from applicants for its mortgage guarantee service, specified in the application therefor, consists of a *fee for inspection* and appraisal of the property.

12. The gross income of the plaintiff for the calendar years 1921 to 1925, inclusive, reported by it to the insurance department of the State of New York for said respective years, properly allocated to the various services performed and business done by the plaintiff during said years, consists of the following:

	1921	1922	1923	1924	1925
INCOME FROM FEES AND CHARGES					
(1) Income consisting of the difference between the interest received and guaranteed by plaintiff in connection with its mortgage guarantees	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.93
(2) Income from fees and charges attributable to mortgage guarantees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Income from fees and charges attributable to title insurance where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Income consisting of the compensation and consideration received by the plaintiff for its agreement and undertaking, in its policies of mortgage guarantee, that the mortgage guaranteed is a valid first lien upon a good and marketable title in fee to the property covered by the mortgage	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Income from mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees collected	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches collected	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees collected	3,316.28	4,094.43	6,723.69	6,[illegible]33.14	9,252.70
(9) Charges for surveys collected	392.45	326.80	569.20	1,339.65	1,993.25
Total	630,291.01	925,596.83	1,059,912.07	1,160,895.92	1,420,509.85
Other income, as shown in paragraph 6 above	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	705,458.81	1,028,820.77	1,216,633.12	1,370,822.73	1,661,054.28

(Article 11.)

13. The amount of title insurance written by the plaintiff, where the plaintiff did not make the mortgage loans and did not guarantee the mortgages involved, and the amount of mortgages guar-

anteed by the plaintiff for each of the calendar years 1921 to 1925, inclusive, were as follows:

Year	Title insurance written, where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	Mortgages guaranteed
1921	$29,090,650	$4,389,346
1922	46,050,180	7,319,246
1923	67,138,820	7,988,960
1924	69,442,530	11,341,220
1925	87,965,580	13,214,092

(Article 13.)

14. The aggregate amount of title insurance, where the plaintiff did not make the mortgage loans and did not guarantee the mortgages involved, outstanding during each of the years 1921 to 1925, inclusive, was not less than $100,000,000. (Article 14.)

15. The plaintiff has always maintained a guarantee fund pursuant to the provisions of Article V of the New York insurance law. All of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund. The plaintiff's investments of the classes required for such fund always exceeded the amount required by said statute. No investments were, therefore, segregated by the plaintiff as being a part of a guarantee fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements. (Article 16.)

72 16. The plaintiff is and always has been the sole owner of the aforesaid claims and has not transferred or assigned any of them or any part thereof or interest therein, and has at all times borne true allegiance to the Government of the United States and has in no way voluntarily aided, abetted, or given encouragement to rebellion against said Government. (Article 20.)

In United States District Court

[Title omitted.]

Defendant's request for findings of fact and conclusion of law

Defendant, considering the facts set forth in the agreed statement of facts, Nos. 1 to 20, inclusive, to be proved, and deeming them material to the due presentation of this case in the findings of fact, requests the court to adopt said agreed statement of facts as its findings of fact in this case.

73 CONCLUSION OF LAW

On the foregoing findings of fact, plaintiff is not entitled to recover, and its petition must be dismissed.

Respectfully submitted.

HOWARD W. AMELI,
United States Attorney.
ALBERT D. SMITH,
Ass't. United States Attorney.

In United States District Court

[Title omitted.]

Motion for judgment on behalf of defendant

Now comes the defendant in the above-entitled cause and moves the court for judgment on the following grounds, to wit:

1. That the plaintiff has in this case adduced no substantial and/or sufficient evidence which warrants a judgment in its favor and against this defendant.

74 2. That plaintiff during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods here in question entitled to be classed as an insurance company under the provisions, and within the meaning, of sections 246, 247, and 1000 of the revenue act of 1921.

3. That plaintiff during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods here in question entitled to exemption from the payment of the capital stock taxes imposed by section 1000 of the revenue act of 1921.

4. That a substantial portion of plaintiff's income derived in the general conduct of its business during the years 1921 to 1925, inclusive, was not, within the intent and meaning of sections 246 and 247 of the revenue act of 1921, the income of an insurance company as therein defined, and by reason thereof plaintiff was not during the periods here in question entitled to be classed as an insurance company within the intent and meaning of Congress for the purposes of Federal taxation under the said revenue act of 1921.

5. That plaintiff's so-called policy of mortgage guarantee, entitled "mortgage guarantee" (Exhibit N), and so-called certificate of participation, entitled "guaranteed first-mortgage certificate" (Exhibit O), were not, nor was either of them, contracts of insurance, but the same constituted contracts of guarantee.

6. That the taxes sought to be recovered herein were legally assessed and lawfully collected by this defendant.

75 7. That on the facts and on the law defendant is entitled to judgment dismissing plaintiff's petition at its costs.

Respectfully submitted.

HOWARD W. AMELI,
United States Attorney,
ALBERT D. SMITH,
Asst. United States Attorney,
Attorneys for Defendant.

[Title omitted.]

Motion for judgment on behalf of defendant

In United States District Court

Now comes the defendant in the above-entitled cause and moves the court for judgment on the following grounds, to wit:

1. That the plaintiff has in this case adduced no substantial and/or sufficient evidence which warrants a judgment in its favor and against this defendant.

76 2. That plaintiff during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods herein question entitled to be classed as an insurance company under the provisions and within the meaning of sections 246, 247, and 1000 of the revenue act of 1921, and sections 246, 247, and 700 of the revenue act of 1924.

3. That plaintiff, during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods here in question entitled to exemption from the payment of the capital-stock taxes imposed by section 1000 of the revenue act of 1921, and section 700 of the revenue act of 1924.

4. That a substantial portion of plaintiff's income derived in the general conduct of its business during the years 1921 to 1925, inclusive, was not, within the intent and meaning of sections 246 and 247 of the revenue acts of 1921 an 1924, the income of an insurance company as therein defined, and by reason thereof plaintiff was not during the periods here in question entitled to be classed as an insurance company within the intent and meaning of Congress for the purposes of Federal taxation under the said revenue acts of 1921 and 1924.

5. The plaintiff's so-called policy of mortgage guarantee, entitled "mortgage guarantee" (Exhibit N), and so-called certificate of participation, entitled "guarantee first-mortgage certificate" (Exhibit O), were not, nor was either of them, contracts of insurance, but the same constituted contracts of guarantee.

77 6. That the taxes sought to be recovered herein were legally assessed and lawfully collected by this defendant.

7. That on the facts and on the law defendant is entitled to judgment dismissing plaintiff's petition at its costs.

Respectfully submitted.

HOWARD W. AMELI,
United States Attorney,
ALBERT D. SMITH,
Asst. United States Attorney,
Attorneys for Defendant.

In United States District Court

[Title omitted.]

Notice of exceptions

SIRS:

Please take notice that Home Title Insurance Company, the plaintiff herein, excepts to the decision and findings of the court filed in the above-entitled action on the 11th day of June, 1930, and to
78 the refusal of the court to find facts and conclusions of law as requested by the plaintiff in the following particulars:

(1) The plaintiff excepts and objects to the court's refusal and failure, upon its decision of this case, to separately state its findings of fact and conclusions of law, as requested by the parties herein in their agreed statement of facts.

(2) The plaintiff excepts and objects to the court's refusal and failure, upon its decision in this case, to make the findings of fact requested by the plaintiff in its amended request for findings of fact filed on April 8, 1930.

(3) The plaintiff excepts and objects to the court's decision and finding that the defendant is entitled to judgment in its favor.

(4) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable years ended June 30, 1923 and 1924, the plaintiff was, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

(5) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

(6) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable years ending June 30, 1923 and 1924, the plaintiff was not subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

79 (7) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable year beginning

July 1, 1924, and ending June 30, 1925, the plaintiff was not subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

(8) The plaintiff excepts and objects to the court's refusal and failure to find that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was erroneously and illegally assessed and collected and the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

(9) The plaintiff excepts and objects to the court's refusal and failure to find that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was erroneously and illegally assessed and collected and the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

(10) The plaintiff excepts and objects to the court's refusal and failure to find that the capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was erroneously and illegally assessed and collected and the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

(11) The plaintiff excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

80 (12) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by sections 243 or 246 of the revenue act of 1924.

(13) The plaintiff excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

(14) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

(15) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,392, for the taxable year ended June 30, 1923, was properly and legally collected from the plaintiff.

(16) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,850, for the taxable year ended June 30, 1924, was properly and legally collected from the plaintiff.

(17) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $2,144, for the taxable year ended June 30, 1925, was properly and legally collected from the plaintiff.

81 (18) The plaintiff excepts and objects to the court's decision and finding that the plaintiff is not entitled to judgment in its favor.

Dated, New York, N. Y., August 5, 1930.

WEILL, WOLFE & SATTERLEE,
Attorneys for Plaintiff,

Office & P. O. Address, No. 52 William Street, Borough of Manhattan, New York, N. Y.

To HOWARD W. AMELI, Esq.,
United States Attorney, Attorney for Defendant,
United States Court House, Post Office Building,
Brooklyn, N. Y.

Hon. WILLIAM D. MITCHELL,
Attorney General of the United States,
Washington, D. C.

PERCY G. B. GILKES, Esq.,
Clerk of the United States District Court,
for the Eastern District of New York,
United States Court House, Post Office Building,
Brooklyn, N. Y.

82 *Plaintiff's exceptions to conclusions of law*

In United States District Court

[Title omitted.]

(1) The plaintiff hereby excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

(2) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

(3) The plaintiff excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

83 (4) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

(5) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was properly and legally collected from the plaintiff.

(6) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was properly and legally collected from the plaintiff.

(7) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was properly and legally collected from the plaintiff.

(8) The plaintiff excepts and objects to the court's decision and finding that the defendant is entitled to judgment in its favor and excepts further to the direction of judgment in favor of the defendant.

(9) The plaintiff excepts and objects to the court's failure and refusal to make the following conclusions of law as proposed by the plaintiff:

Conclusions of law numbered 1, 2, 3, 4, 5, 6, and 7, respectively.

And further excepts and objects to the court's failure and refusal to direct the entry of judgment against the defendant and in favor of the plaintiff for the amount of $5,386, with interest
84 from February 4, 1926, and costs and disbursements of this action.

Dated, New York, August 13, 1930.

HUGH SATTERLEE,
Attorney for the Plaintiff.

52 William Street, Borough of Manhattan, New York, N. Y.

In United States District Court

Consent

I hereby consent to the settling, allowing, and filing of the within, together with the exhibits offered in evidence as and for the plaintiff's bill of exceptions.

Dated, New York, November 1, 1930.

HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant.

85 *Exhibits*

EXHIBIT A

Copy of certificate of incorporation of the plaintiff, with all amendments thereto.

EXHIBIT B

MT-CST-1 NY-3752-GCD

MAR. 20, 1926.

HOME TITLE INSURANCE COMPANY,
51 Willoughby Street, Brooklyn, New York.

Claim	List	P.	L.	Amount
R31974	October, 1925	1	5	$1,392
R31975	December, 1923	1	5	1,850
R31976	October, 1925	1	6	2,144

GENTLEMEN:

Reference is made to your claims for the refunding of capital stock tax for the taxable periods ended June 30, 1923, June 30, 1924, and June 30, 1925, respectively.

The organization claims that it is an insurance company and as such is not liable for capital stock tax. The records of this office show that the company previously filed a claim for the abatement of capital stock tax for the taxable period ended June 30, 1924, and that the claim was rejected for the reasons set forth in office letter of December 16, 1925, a copy of which is enclosed.

Inasmuch as no evidence has been furnished to alter the position previously taken, there is no alternative but to reject the claims.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

MB
Copy O. L.
12-16-25.

86

EXHIBIT C

Copy of capital stock tax return filed by the plaintiff for the period beginning July 1, 1922, and ending June 30, 1923.

EXHIBIT D

Copy of claim filed by the plaintiff for the refund of the capital stock tax paid by it for the year ended June 30, 1923.

EXHIBIT E

Copy of capital stock tax return filed by the plaintiff for the period beginning July 1, 1923, and ending June 30, 1924.

EXHIBIT F

Copy of claim filed by the plaintiff for the refund of the capital stock tax paid by it for the year ended June 30, 1924.

87 EXHIBIT G

This exhibit is the same as Exhibit B.

EXHIBIT H

Copy of capital-stock tax return filed by the plaintiff for the period beginning July 1, 1924, and June 30, 1925.

EXHIBIT I

Copy of claim filed by the plaintiff for the refund of the capital-stock tax paid by it for the year ended June 30, 1925.

EXHIBIT J

This exhibit is the same as Exhibit B herein.

88 EXHIBIT K

Fee / Mortgage } Application No. ____ Reissue of ____ Dated _____ 192__

Purchase price $_____ Examination fee $_____

1. Applicant ____ Mortgage ____ $_____ Conveyancing $_____

_____ Recording fees $_____

Address _____ Recording tax $_____

2. Insure _____ Address _____ Survey _____ $_____

_____ Federal tax _____ $_____

3. Title in _____ To fee address _____ Tax search _____ $_____

4. Title in _____ To mtg. _____

Premises _____

_____

Existing mortgages, $_____

Building _____ Occupied by _____

To be reported _____ 192__ to _____

To close _____ M _____ 192__ at office of _____

_____

Papers left with Co. _____

The undersigned hereby applies to Home Title Insurance Company for the examination of the title to the above-described premises and agrees to pay the scheduled fees and disbursements therefor whether the title be approved or not. If said title be approved, a policy of title insurance for the above sum, which the undersigned represents is the purchase price of said premises (if the premises is being purchased), the amount of the mortgage (if the loan is being made), or at least, the assessed value of the premises (if a policy in possession if applied for), will be issued, subject to existing encumbrances. The company will not insure against State and municipal department violations, enforcement of governmental police power or of the national or State prohibition act, or the lien of decedent's

debts, nor will it insure against any state of facts a survey would show unless it is directed to procure a survey. The statements herein made are correct and true to the belief of the undersigned. If, before the closing of the title, the applicant or the undersigned should acquire any information as to defects, objections or encumbrances affecting said title, they will at once fully inform the company thereof.

[OVER.]

EXHIBIT K (REVERSE SIDE)

Remarks---

Section ------ Block ------

Tenement-house department search ---

Inspection ---

Building department search ---

89 EXHIBIT L

Copy of policy of title insurance issued by the plaintiff which, except for the "conditions of this policy," reads as follows:

Home Title Insurance Company, 51 Willoughby Street, 1550 Flatbush Avenue, Brooklyn

20 Herriman Avenue, Jamaica	Home Title Building, Mineola	Bridge Plaza North, Long Island City	Home Title Building, Riverhead

No.

This policy of insurance witnesseth: That the Home Title Insurance Company in consideration of the payment of its charges for the examination of title, insures heirs and devisees, against all loss or damage not exceeding dollars which the insured shall sustain by reason of any defect or defects of title affecting the premises described in Schedule A, hereto annexed, or affecting the interest of the insured therein, as described in said schedule, or by reason of unmarketability of the title of the insured to or in said premises, or by reason of liens or incumbrances charging the same at the date of this policy; excepting judgments against the insured and estates, defects, objections, liens or incumbrances created by the act or with the privity of the insured; saving all loss and damage by reason of the estates, interests, defects, objections, liens, and incumbrances excepted in Schedule B, or by the conditions of this policy, hereto annexed and hereby incor-
90 porated into this contract, or by reason of any restrictions

imposed by the city of New York, the loss and the amount to be ascertained in the manner provided in said conditions and to be payable upon compliance by the insured with the stipulations of said conditions, and not otherwise.

In witness whereof, the Home Title Insurance Company has caused its corporate seal to be hereunto affixed and these presents to be signed by two of its officers this

Vice President.

Attest,

Assistant Secretary.

Schedule A

1. The estate or interest of the insured in the premises described below, covered by this policy.

2. The deed or other means by which the estate or interest covered by this policy is vested in the insured.

3. The premises in which the insured has the estate or interest covered by this policy.

Schedule B

This policy does not insure against such estates, interests, defects, objections to title, charges, and incumbrances, affecting such premises, or the estate or interest insured as are set forth below in this schedule.

91 EXHIBIT M

Title service application No. ____ Reissue of ____ Dated _____ 192__

1. Applicant _____ Address _____ Examination fee, $_____
2. Insure Home Title Insurance Company and its assignees to mortgage loan $___ year ___ % on advances ___ % thereafter_____ Inspections and appraisal fee__ $_____ Conveyancing___ $_____ Recording fees__ $_____
3. Insure_____ to fee, $_____ Recording tax __ $_____
4. Title in_____ Survey_____ $_____
   Premises_____ Federal tax ____ $_____
   Existing mortgages, $_____

To be reported _____ 192__ to_____
To close _____ M _____ 192__ at office of company.
Applicant's broker:
Papers left with Co. _____ Fire insurance broker: _____

The undersigned, having applied to Home Title Insurance Company for a loan as above set forth, which loan is not to be made unless title is satisfactory to said company, hereby applies to said company for the examination of the title and agrees to pay the fees and disbursements above set forth on the date above fixed for closing

said loan, whether said loan is made or not. The undersigned also agrees to pay all future installments of assessments, whether liens or not, before the loan is made.

The undersigned hereby authorizes said company to obtain fire insurance for $------, in any corporations authorized to do business in New York, on the buildings to be covered by the mortgage, from the date of closing of said loan until it is fully paid, and agrees to pay the premium to the date of the maturity of the loan, at the time of closing.

---------- *Applicant.*

EXHIBIT M (REVERSE SIDE)

Loan of $----------
Approved by Ex. Com. ---------- 192--

Section---------- Block----------

Land $----------
Building $----------
Insurance----------
Tenement house dept. sch----------
Bldg. dept. sch----------
Inspection----------

92 EXHIBIT N

Home Title Insurance Company, 51 Willoughby Street, 1550 Flatbush Avenue, Brooklyn

Home Title Building, Mineola

Home Title Building, Riverhead

20 Herriman Avenue, Jamaica

Guarantee No.

Home Title Insurance Company (hereinafter termed "the company"), in consideration of the premium and agreements hereinafter set forth, hereby guarantees to

Address:

and to such subsequent owners of the bond and mortgage described in Schedule "A" hereof, as shall give to the company prompt notice and proof of such ownership (all of whom are hereinafter termed "the insured"):

First: Payment of the interest on the said bond and mortgage at the rate of per centum per annum, from , when the same becomes due under the terms hereof.

Second: Payment of the principal of the said bond and mortgage as soon as collected, and in any event within twelve months after the same becomes due under the terms hereof, with regular payment meanwhile of the interest at the rate hereby guaranteed.

93 Third: To continue this guarantee on any extension of the said mortgage to which the company shall consent in writing.

Fourth: That the said mortgage is a valid first lien upon a good and marketable title in fee to the property described in Schedule "A."

Fifth: To keep the mortgaged premises insured against fire, and to enforce prompt payment of all fire insurance premiums and all taxes, assessments, and water rates which may become liens thereon.

Sixth: To conduct without expense to the insured all actions or proceedings that it may deem necessary to take in connection with this guarantee, or the said bond or mortgage, and any action that may be brought against the insured as the owner thereof.

By the acceptance of this guarantee the insured agrees—

1. That the company is the agent of the insured to collect all the interest and principal secured by said bond and mortgage, and to exercise and enforce any right or option secured to the insured thereby, and by any policy of fire insurance upon the premises covered by said mortgage, and to bring in the name of the insured any action that may be necessary in connection therewith, and to receive any proceeds thereof.

2. To refrain from collecting any part of the said interest or principal, and from exercising any right or option secured by the said bond or mortgage, or by any policy of fire insurance covering the mortgaged premises, and from doing anything which in any

94 way affects the validity or the security, or the terms of the said bond and mortgage.

3. To permit the company to retain as its premium for this guarantee all interest collected in excess of the rate hereby guaranteed, and to have possession of all fire insurance policies covering the mortgaged premises.

4. To produce and deposit the said bond and mortgage with the company upon its request, and to render such reasonable assistance as the company may require in any proceedings taken in connection therewith.

5. To notify the company in writing promptly of any action or proceeding affecting said bond or mortgage and to forward to the company promptly any notice relating to any policy of fire insurance affecting the mortgaged premises.

6. To assign said bond and mortgage to the company if requested, upon receipt from it of the full amount due the insured, whenever under the terms thereof payment of the principal may be demanded.

General provisions

All notices required or given under this guarantee by the insured to the company, or by the company to the insured, shall be in writing and may be sent by mail.

Notices from the company to the insured shall be sent to the address stated above or to any other address of which the company shall have received written notice.

Notices from the insured to the company shall be sent to its principal office in the Borough of Brooklyn, in the city of New
95 York, and all payments by this company shall be made at the same place.

In witness whereof, the said company has caused its corporate seal to be hereto affixed and these presents to be signed by two of its officers, this

HOME TITLE INSURANCE COMPANY,
Vice-President.
Assistant Secretary.

Schedule "A"

The bond covered by this guarantee is made by to the Home Title Insurance Company, dated , and is marked for identification with the number of this guarantee and the signature of one of the officers of the company. It is given for the payment of $ on the day of 19 , with interest, payable on the

The mortgage given to secure said bond is similarly identified and is made by to the Home Title Insurance Company, dated , and was recorded

The real property covered by said mortgage is the following:

96 EXHIBIT O

Home Title Insurance Company, 51 Willoughby Street, Brooklyn

Guaranteed first mortgage certificate

Guarantee No. C 00000 $ Loan No.

Home Title Insurance Company (hereinafter termed "the company") hereby certifies that it has received from (hereinafter termed "the purchaser") the sum of dollars. for the purchase of, and hereby assigns to the purchaser, an undivided share or interest to the extent of said sum in the bond made by for $, dated , due , and in the first mortgage securing the same, covering premises with interest guaranteed at the rate of per centum per annum from

the date hereof, payable on the first days of and in each year.

The company guarantees the payment of the principal of said sum as soon as collected, and in any event within twelve months after the same becomes due, with regular payments meanwhile of interest at the rate hereby guaranteed.

This certificate may be assigned by endorsement thereon, but only when such assignment is registered on the books of the company.

The company further certifies that it holds said bond and mortgage together with any guaranties of payment, insurance
97 policies and other instruments and evidences of title relating thereto, for the benefit of the purchaser and of any other persons interested in said bond and mortgage, and further that the share or interest represented by this certificate is not subordinate to any other shares in said bond and mortgage, and is not subject to any prior interests therein, and that the total of this and similar certificates shall never aggregate more than the amount of principal remaining unpaid upon the said bond and mortgage, which is a valid first lien upon the real property therein described.

The following conditions are hereby mutually agreed upon between the company and the purchaser:

First: The company shall collect the interest and principal of said bond and mortgage and shall retain as its premium all interest collected in excess of the rate hereby guaranteed.

Second: The company shall have full and exclusive power to take any action it may deem necessary or desirable in order to enforce any of the provisions of said bond and mortgage and fire-insurance policies and to protect the mortgage security, and may satisfy and discharge said mortgage on receiving full payment thereof and may use for, collect or compromise the fire insurance in case of loss by fire.

Third: The company may take up and cancel this certificate at any time on thirty days' notice in writing to the purchaser and payment of the amount owing for principal and interest. All notices to the company must be in writing and must be sent to its principal office in the Borough of Brooklyn, City of New York, and all payments by the company shall be made at same place.

98 In witness whereof, the company has caused its corporate seal to be hereunto affixed and these parents to be signed by one of its officers.

Dated, Entered

HOME TITLE INSURANCE COMPANY CASHIER by
SPECIMEN.

Registered

EXHIBIT P

Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1921.

EXHIBIT Q

Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1922.

EXHIBIT R

Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1923.

99 EXHIBIT S

Copy of the income tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1924.

EXHIBIT T

Copy of the income tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1925.

EXHIBIT U

Copy of claim for abatement filed by the plaintiff on or about April 1, 1924.

EXHIBIT V

Copy of letter of the Commissioner of Internal Revenue, addressed to the plaintiff bearing date of January 13, 1925, and the symbols MT-CST-1 N.Y.-3752-GCD CL-A59803.

EXHIBIT W

Copy of letter of the plaintiff addressed to the Commissioner of Internal Revenue bearing date of January 27, 1925.

100 EXHIBIT X

Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff, bearing date of February 12, 1925, and the symbols MT-CST-1 N.Y.-3752-GCD C 1-A59803.

EXHIBIT Y

Copy of letter of the plaintiff addressed to the Commissioner of Internal Revenue bearing date of March 4, 1925.

EXHIBIT Z

Copy of the plaintiff's by-laws in effect during the calendar years 1921, 1922, and 1923.

EXHIBIT YY

Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff bearing date of December 16, 1925, and the symbols MT–CST–1 N.Y.–3752–GCD.

EXHIBIT 1

Copy of mortgage guarantee of the First Mortgage Guaranty Company.

101 EXHIBIT 2

Copy of guaranteed first-mortgage participation certificate of the First Mortgage Guaranty Company.

EXHIBIT 3

Copy of mortgage guarantee of the Guranteed Mortgage Company of New York.

EXHIBIT 4

Copy of guaranteed first-mortgage certificate of the Guranteed Mortgage Company of New York.

EXHIBIT 5

Copy of application for a first-mortgage loan of the Guaranteed Mortgage Company of New York.

102 *Order dispensing with printing of certain exhibits*

In United States Circuit Court of Appeals for the Second Circuit

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

against

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Upon the annexed consent and on motion of Weill, Wolff & Satterlee, attorneys for the plaintiff-appellant, it is hereby

Ordered that the following exhibits need not be printed in the record on appeal, but the same may be referred to on the argument and shall be deemed as part of said record as if printed therein, and any such exhibit or exhibits may be submitted to the Circuit Court on the argument of the appeal by either side.

Exhibit A—Copy of certificate of incorporation of the plaintiff-appellant, with all amendments thereto.

Exhibit C—Copy of capital stock tax return filed by the plaintiff-appellant for the period beginning July 1, 1922, and ending June 30, 1923.

Exhibit D—Copy of claim filed by the plaintiff-appellant for the refund of the capital stock tax paid by it for the year ended June 30, 1923.

103 Exhibit E—Copy of capital stock tax return filed by the plaintiff-appellant for the period beginning July 1, 1923, and ending June 30, 1924.

Exhibit F—Copy of claim filed by the plaintiff-appellant for the refund of the capital stock tax paid by it for the year ended June 30, 1924.

Exhibit G—This exhibit is the same as Exhibit B.

Exhibit H—Copy of capital stock tax return filed by the plaintiff-appellant for the period beginning July 1, 1924, and June 30, 1925.

Exhibit I—Copy of claim filed by the plaintiff-appellant for the refund of the capital stock tax paid by it for the year ended June 30, 1925.

Exhibit J—This exhibit is the same as Exhibit B herein.

Exhibit L—Copy of policy of title insurance issued by the plaintiff-appellant.

Exhibit P—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1921.

Exhibit Q—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1922.

Exhibit R—Copy of the income-tax return together with the schedules attached thereto, filed by the plaintiff for the calendar year 1923.

104 Exhibit S—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1924.

Exhibit T—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1925.

Exhibit U—Copy of claim for abatement filed by the plaintiff-appellant on or about April 1, 1924.

Exhibit V—Copy of letter of the Commissioner of Internal Revenue, addressed to the plaintiff-appellant bearing date of January 13, 1925, and the symbols MT–CST–1 NY–3752–GCD CL–A59803.

Exhibit W—Copy of letter of the plaintiff-appellant addressed to the Commissioner of Internal Revenue bearing date of January 27, 1925.

Exhibit X—Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff, bearing date of February 12, 1925, and the symbols MT–CST–1 NY–3752–GCD C 1–A59803.

Exhibit Y—Copy of letter of the plaintiff-appellant addressed to the Commissioner of Internal Revenue bearing date of March 4, 1925.

Exhibit Z—Copy of the plaintiff-appellant's by-laws in effect during the calendar years 1921, 1922, and 1923.

Exhibit YY—Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff-appellant bearing date of December 16, 1925, and the symbols MT–CST–1 NY–3752–GCD.

Exhibit 1—Copy of mortgage guarantee of the First Mortgage Guaranty Company.

105 Exhibit 2.—Copy of guaranteed first mortgage participation certificate of the First Mortgage Guaranty Company.

Exhibit 3.—Copy of mortgage guarantee of the Guaranteed Mortgage Company of New York.

Exhibit 4.—Copy of guaranteed first mortgage certificate of the Guaranteed Mortgage Company of New York.

Exhibit 5.—Copy of application for a first moregage loan of the Guaranteed Mortgage Company of New York.

Dated, New York, October 15, 1930.

MANTON,
United States Circuit Judge.

Entry of the foregoing order is hereby consented to without further notice.

Dated, New York, October 15, 1930

HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant-Appellee.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.

106 In United States District Court

L–3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF
against
UNITED STATES OF AMERICA, DEFENDANT

Order for judgment

June 24, 1930

The above-entitled action having come regularly on to be heard before the Honorable Clarence G. Galston, one of the judges of the United States District Court for the Eastern District of New York, having commenced and concluded on the 24th day of Feb-

ruary, 1930, the facts in the case having theretofore been stipulated by and between the attorneys for the respective parties, and Messrs. Weill, Wolff & Satterlee, appearing for the plaintiff by Hugh Satterlee and I. Herman Sher, Esqs., of counsel, and Howard W. Ameli, United States attorney for the Eastern District of New York, appearing for the defendant, E. H. Horton and Albert D. Smith, Esqs., of counsel, and after due deliberation having
107 been had thereon, the court made and filed its decision on the 11th day of June, 1930.

Now, on motion of Howard W. Ameli, United States attorney for the Eastern District of New York, attorney for the defendant, it is

Ordered, adjudged, and decreed that the motion for judgment on behalf of the defendant, heretofore submitted on the trial of the above-entitled action, be, and the same hereby is, granted; and it is further

Ordered, adjudged, and decreed that the United States of America, the defendant above named, have judgment against the Home Title Insurance Company, the plaintiff herein, dismissing the action, together with costs and disbursements of this action.

CLARENCE G. GALSTON,
U. S. D. J.

108 *Judgment*

In United States District Court, Eastern District of New York

No. L-3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

This court having by an order dated June 24th, 1930, ordered judgment in favor of the defendant and against the plaintiff, dismissing the complaint on the merits with costs to be taxed, and the costs having been duly adjusted at the sum of twenty and 00/100 ($20.00) dollars,

Now, on motion of Howard W. Ameli, United States attorney for the Eastern District of New York, it is

Ordered and adjudged that the United States of America, defendant, sued herein, have judgment against the plaintiff, Home Title Insurance Company, dismissing the complaint of the plaintiff herein on the merits, together with costs amounting to twenty and 00/100 ($20.00) dollars and that it have execution therefor.

Judgment signed and entered this 16th day of August, 1930.

PERCY G. B. GILKES,
Clerk.

By J. O. COCHRANE,
Deputy Clerk.

109 In United States District Court

[Title omitted.]

Notice and allowance of appeal

SIRS:

You will please take notice, that Home Title Insurance Company, the plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of the United States District Court for the Eastern District of New York, entered herein on the 24th day of June, 1930, granting the motion for judgment on behalf of the defendant, theretofore submitted on the trial of the above-entitled action, and adjudging that the defendant have judgment against the plaintiff, dismissing the action, together with costs and disbursements thereof, and from the judgment at law of the United States District Court for the Eastern District of New York, entered herein pursuant to said order on the 16th day of August, 1930, in the office of the Clerk of said United States District Court in favor of the defendant and against the plaintiff dismissing the complaint herein on the merits, together with costs amounting to
110 $20, and from each and every part of said order and judgment, respectively, as well as from the whole thereof.

Dated, New York, August 27, 1930.

HUGH SATTERLEE,
WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office and post-office address, 52 William Street, Borough of Manhattan, New York, N. Y.

To HOWARD W. AMELI, Esq.,
United States Attorney, Attorney for Defendant,
United States Court House, Post Office Building,
Brooklyn, New York.

Hon. WILLIAM D. MITCHELL,
Attorney General of the United States,
Washington, D. C.

PERCY G. B. GILKES, Esq.,
Clerk of the United States District Court
for the Eastern District of New York,
United States Court House, Post Office Building,
Brooklyn, New York.

The above appeal as prayed for is hereby allowed and the amount of the cost bond to be filed by the plaintiff herein is hereby fixed at $250.

August 27, 1930.

MARCUS B. CAMPBELL,
Judge of the United States District Court
for the Eastern District of New York.

111 [Citation in usual form omitted in printing.]

112 In United States District Court

Assignment of errors

[Title omitted.]

Now comes Home Title Insurance Company, the plaintiff in the above-entitled action, and in connection with its petition and claim of appeal to the Circuit Court of Appeals for the Second Circuit, says that in the record, proceedings, and judgment in the above-entitled cause manifest error has intervened to its prejudice, and assigns for error the following:

1. The court erred in failing to separately state its findings of fact and conclusions of law, as requested by the parties herein in their agreed statement of facts.

2. The court erred in failing to make the findings of fact requested by the plaintiff in its amended request for findings of fact filed on April 8, 1930.

3. The court erred in directing judgment in favor of the defendant and against the plaintiff upon all the facts found.

4. The court erred in granting the defendant's motion for
113 the entry of judgment in its favor dismissing the complaint upon all the facts found.

5. The court erred in holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

6. The court erred in holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

7. The court erred in holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was subject to the capital stock tax imposed by Section 1000 of the revenue act of 1921.

8. The court erred in holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

9. The court erred in holding that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1926, was properly and legally collected from the plaintiff.

10. The court erred in holding that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was properly and legally collected from the plaintiff.

11. The court erred in holding that the capital stock tax in
114 the sum of $2,144 for the taxable year ended June 30, 1925, was properly and legally collected from the plaintiff.

12. The court erred in failing to hold that during the taxable years ended June 30, 1923 and 1924, the plaintiff was, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

13. The court erred in failing to hold that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

14. The court erred in failing to hold that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not subject to the capital stock imposed by section 1000 of the revenue act of 1921.

15. The court erred in failing to hold that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

16. The court erred in failing to hold that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was erroneously and illegally assessed and collected and that the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

17. The court erred in failing to hold that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was erroneously and illegally assessed and collected and that the
115 plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

18. The court erred in failing to hold that the capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was erroneously and illegally assessed and collected and that the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

19. The court erred in failing to direct the entry of judgment against the defendant and in favor of the plaintiff for the amount of $5,386, with interest from February 4, 1926, upon all the facts found.

Wherefore the said plaintiff, Home Title Insurance Company, prays that the judgment herein in favor of the defendant may be

reversed and held for naught and that said plaintiffq may be restored to all things which it has lost by reason of said judgment.

Dated, New York, N. Y., August 27, 1930.

HUGH SATTERLEE,
WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office & P. O. address, No. 52 William Street, Borough of Manhattan, New York, N. Y.

116 [Bond on appeal for $250.00 approved; omitted in printing.].

117–121 [Omitted.]

122 In United States District Court

Order extending time to perfect appeal

[Title omitted.]

It is hereby stipulated and agreed that the time of the defendant-appellee, the United States of America, to serve upon the appellant its proposed changes, additions, or amendments under rule 26 of the Rules of the United States District Court for the Eastern District of New York, be extended to and including the 27th day of September, 1930; and it is further

Stipulated and agreed that the time of the plaintiff-
123 appellant to settle and file its bill of exceptions and transcript of record herein, and to docket the above-named case, and to print, serve and file its transcript of record on appeal, is extended to and including the 26th day of October, 1930; and it is further

Stipulated and agreed that the June, 1930, term of this court during which the plaintiff-appellant may settle, serve, and file its bill of exceptions and transcript of the record be extended to and including the 26th day of October, 1930.

Dated, Brooklyn, New York, September 10, 1930.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.
HOWARD W. AMELI,
United States Attorney.
By HERBERT H. KELLOGG,
Assistant U. S. Attorney.

So ordered.

GROVER M. MOSCOWITZ,
U. S. D. J.

124 In United States District Court

[Title omitted.]

Order settling transcript of record.

The plaintiff-appellant having in due time served its proposed record and bill of exceptions on defendant-appellee; the latter having in due time proposed amendments thereto numbered 1 to 7, inclusive; plaintiff-appellant having in due time accepted amendments numbered 4 and 7, respectively, and served notice of its rejection of all other of said proposed amendments, and plaintiff-appellant having further in due time served notice on defendant-appellee that it would move before Hon. Clarence G. Galston at his chambers in the Eagle Building, Johnson and Adams Streets, Borough of Brooklyn, City of New York, on the 1st day of October, 1930, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order settling and determining the said objections and exceptions to the proposed record on appeal herein and for such other and further relief as may be proper in the premises; and the time for the
125 hearing of said motion having been adjourned to and including the 8th day of October, 1930, by stipulation of the parties,

Now, on motion of Weill, Wolff & Satterlee, attorneys for the plaintiff-appellant,

It is hereby certified that the record and bill of exceptions proposed by the plaintiff-appellant, together with the amendments thereto numbered 4 and 7 proposed by the defendant-appellee, constitute a correct copy of the transcript of record of the District Court of the United States of America for the Eastern District of New York in the above-entitled matter, and the same is hereby settled as the case herein and is hereby ordered to be filed in the office of the clerk of this court.

Dated, October 8th, 1930.

CLARENCE G. GALSTON,
U. S. D. J.

126 In United States District Court

[Title omitted.]

Order extending time to perfect appeal

It is hereby stipulated and agreed that the time of the plaintiff-appellant to docket the above named case, and to print, serve, and file its transcript of record on appeal is extended to and including the 10th day of November, 1930.

Dated, Brooklyn, N. Y., October 20, 1930.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.
HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant-Appellee.

So ordered:
CLARENCE G. GALSTON,
U. S. D. J.

127 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed by and between the parties that the foregoing is a true copy of the transcript of record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York. November 1, 1930.

HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant-Appellee:
WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.

In United States District Court

Order as to record

Upon the above stipulation, it is

Ordered that the foregoing printed record be filed for use by the clerk of this court in lieu of the original papers in certifying a record on appeal.

Dated, Brooklyn, N. Y., November 3, 1930.

CLARENCE G. GALSTON,
U. S. D. J.

128 [Clerk's certificate to foregoing transcript omitted in printing.]

129 In United States Circuit Court of Appeals for the Second Circuit

October term, 1930

No. 225

Argued January 22, 1931. Decided June 1, 1931

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York

Before MANTON, L. HAND, and SWAN, Circuit Judges

Action by Home Title Insurance Company, a New York corporation, to recover capital stock taxes alleged to have been illegally collected from it for the taxable years ending June 30, 1923, 1924, and

1925, respectively. After trial without a jury on stipulated facts, judgment was entered dismissing the complaint and awarding costs to defendant. The plaintiff appeals. Judgment reversed.

For the opinion below, see (D. C.) 41 F. (2d) 793.

Weill, Wolff & Satterlee, of New York City (Hugh Satterlee and I. Herman Sher, both of New York City, of counsel), for appellant.

Howard W. Ameli, U. S. atty., and Herman H. Kellogg, asst. U. S. atty., both of Brooklyn, N. Y. (C. M. Charest, Gen. Counsel Bureau of Internal Revenue, and E M. Horton, Bureau of Internal Revenue, both of Washington, D. C., of counsel), for the United States.

Opinion

SWAN, Circuit Judge: This is a suit brought in the District Court pursuant to section 24 of the Judicial Code, 28 U. S. C. A. § 41 (20), for the recovery of capital-stock taxes. The taxes in litigation were legally collected if the plaintiff was taxable under section 1000 of the revenue act of 1921 (42 Stat. 294) in respect to the taxable years 1923 and 1924, and under section 700 of the revenue act of 1924 (43 Stat. 325 [26 U. S. C. A. § 223 note]) in respect to the taxable year 1925, but were illegally collected if the plaintiff was an "insurance company subject to the tax imposed by section 246" of said revenue acts (42 Stat. 262; 43 Stat. 290). The court below ruled that it was not an "insurance company" within the meaning of the section last mentioned. The correctness of that ruling is presented by this appeal.

The plaintiff was incorporated in 1906 under article 5 of the insurance law of the State of New York pertaining to title and credit guaranty corporations. New York Laws 1892, c. 690. It is subject to, and has complied with, the regulations of the insurance department of the State, and has regularly filed the annual reports required by law to be filed with the State superintendent of insurance. Its business consists in the insurance of title to real estate and the guaranteeing of real estate mortgages. Because of the Government's contention, which prevailed below, that the plaintiff is not "an insurance company," it is necessary to state in some detail how its business is conducted.

Plaintiff's practice with respect to title insurance is as follows: Upon receiving an application for title insurance, plaintiff searches the record title of the real estate in question, and, if the title is found satisfactory, issues its "Policy of title insurance" in a stated amount against loss due to defect in title. As consideration therefor,
130 it receives payment of its charges for the examination of title; such charges being in accordance with a fixed scale of rates based on the amount of the policy. If the title is disapproved, no policy is issued, but plaintiff collects from the applicant its charges for the examination of title at the same rate as if the policy had been issued in the amount applied for.

Plaintiff's practice in connection with guaranteeing mortgages involves the making of loans by it secured by mortgage on real estate. Upon receipt of an application for a mortgage loan, plaintiff not only searches the title, but makes an inspection and appraisal of the property in question. If the title and the value of the security is found satisfactory, plaintiff prepares a bond and mortgage to be executed by the applicant, and, after recordation of the mortgage, pays the applicant the face amount of the bond less its charges for title examination, appraisal, etc. Thereafter the bond and mortgage are sold by plaintiff, principally to savings banks and insurance companies which apply to it for guaranteed loans, for the face value thereof, accompanied by plaintiff's "policy" of guaranty, the purchaser agreeing that the plaintiff shall collect the interest and principal of the bond and mortgage and shall retain as compensation all interest collected in excess of the rate guaranteed, which is usually one-half of one per cent less than the interest rate expressed in the bond. This excess of interest collected by the plaintiff constitutes the consideration or "premium" for its "policy." By the terms of its policy plaintiff "guarantees" to the purchaser, and to subsequent owners of the bond and mortgage, payment at the guaranteed rate of the interest when due under the terms of the bond and mortgage; payment of the principal thereof when collected, and in any event within twelve months after the same becomes due; that the mortgage is a valid first lien upon a marketable title in fee to the premises described; to enforce prompt payment of fire insurance premiums, taxes, and water rates; and to conduct "without expense to the insured" any litigation involving the bond and mortgage or plaintiff's guaranty. By accepting the policy the insured appoints plaintiff his agent to collect the interest and principal, and agrees to facilitate any litigation plaintiff may engage in respecting the bond and mortgage, to assign the same to plaintiff upon receiving from it payment in full after maturity, and to allow plaintiff to retain from the interest collected its aforesaid "premium." Sometimes, instead of disposing of the bond and mortgage in its entirety, plaintiff sells participations therein and issues what it calls "guaranteed first mortgage certificates." Such a certificate combines an assignment of an undivided part interest in a specified bond and mortgage with a guaranty similar in terms to the regular guaranty policy as to payment of interest and principal of the mortgage, which plaintiff "certifies" is a valid first lien upon the property therein described. Substantially all mortgage loans are disposed of soon after plaintiff acquires them; the average period during which it holds a mortgage before selling it not exceeding two months. The primary purpose of plaintiff in making loans on bonds and mortgages has not been for investment, but for sale guaranteed as aforesaid.

During the taxable years here in question all plaintiff's capital, surplus, and undivided profits were employed indiscriminately in its business activties, and no segregation was made on its books of

account of its expenses as between that portion of its business described as insurance of titles and that portion described as guaranteeing mortgages. Without attempting to determine exactly how much of plaintiff's income should be allocated to insurance of titles and how much to guaranteeing of mortgages (the parties not being in agreement), it will suffice to state that a very substantial part of its income is derived from the latter phase of its business.

Under the law of the State of New York, corporations organized under the banking laws of the State (Consol. Laws N. Y. c. 2) and subject to supervision of the banking department are authorized to make mortgage loans and sell the same with their guaranty, and the record discloses that during the years in question two such corporations were regularly engaged in substantially the same manner as was the plaintiff in selling to the investing public mortgages and participations in mortgages guaranteed by them, except that they did not guarantee title to the mortgaged premises.

If plaintiff's business consisted solely in the insurance of titles, the Government would apparently concede that it was an insurance company subject to tax under section 246. See Sol. Mem. 5501, V–1 C. B. 102; G. C. M. 5355 VII–2 C. B. 160. But it is contended that the guaranteeing of mortgages is not insurance, and the court below so held. The argument runs that a guaranty, i. e., the promise to pay the debt of another, can not be insurance, because it is not a contract of indemnity. Speaking generally, it may be said that a contract of insurance is a contract of indemnity, and many authorities might be cited containing statements to this effect. See United States v. Supplee-Biddle Hardware Co., 265 U. S. 189, 195, 44 S. Ct. 546, 68 L. Ed. 970; Claflin v. U. S. Credit System Co., 165 Mass. 501, 502, 43 N. E. 293, 52 Am. St. Rep. 528; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 31, 54 Am. Dec. 309. The statement is true if it means that the insured must have some interest at risk, for otherwise the contract is a wager; but it is not true if construed to mean that the insured can never collect from the insurer more than his actual loss (Empire Development Co. v. Title Guarantee & Trust Co., 225 N. Y. 53, 58, [illegible] N. E. 468), or that the insured must first salvage what he can and then look to the insurer only for the difference. As is well known, it is the common practice of fire and marine insurers to pay in full and take over the physical remnants of the insured property in the event of injury sufficient to constitute a "total loss." They do not indemnify the insured in the sense required by the defendant's argument; rather they pay upon the happening of the condition specified in the policy, and themselves work out the salvage. Similarly, a policy of credit insurance would surely be no less insurance because the contract provided that upon the debtor's default the insurer would pay in full and take over the claim for collection. See Dane v. Mortgage Ins. Co. [1894], 1 Q. B. 54; Shaw v. Royce [1911], 1 Ch. 138. This is in substance what the

131

plaintiff agrees to do in its policies of mortgage guaranty. If the mortgagor pays, the plaintiff will remit as soon as collected, reserving its "premium" from the interest, but in any event it will pay on the date specified in its "policy." It bears the risk of noncollection from the mortgagor.

It may be important at times to distinguish between contracts of "guaranty," "suretyship," or "indemnity," where the rights of the parties to the contract are involved. But where, as here, the question is whether a company engaged in the business of issuing such contracts in large numbers is doing a business of insurance, the answer is not to be found in technical differences of surety and guarantor. There is no hard and fast line between contracts of insurance and contracts of guaranty. Frost, Law of Guaranty Insurance (2d Ed.) 16; Hunt v. New Hampshire Fire Underwriters' Ass'n, 68 N. H. 305, 308, 38 A. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602. Insurance differs from guaranty only as the business of insurance differs from a single contract of guaranty, suretyship, or indemnity. The business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it. As this court said in Tebbets v. Mercantile Credit Guarantee Co., 73 F. 95, at page 97, in respect to credit insurance: "Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability, as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

Guaranteeing the payment of mortgages bears a close analogy to credit insurance, and to fidelity insurance as practiced by corporate sureties for profit. See Town of Whitestown v. Title Guaranty & Surety Co., 72 Misc. Rep. 498, 131 N. Y. S. 390, affirmed 209 N. Y. 512, 102 N. E. 1115; State v. Chicago Bonding & Surety Co., 279 Mo. 535, 215 S. W. 20; Young v. Am. Bonding Co., 228 Pa. 373, 77 A. 623; Philadelphia Casualty Co. v. Fechheimer, 220 F. 401, 417, Ann. Cas. 1917D, 64 (C. C. A. 6). If the sole service rendered by a corporation consisted in guaranteeing the payment of mortgages upon application by the mortgagees, it would seem to us perfectly clear that the business was truly "insurance." See People v. Potts, 264 Ill. 522, 528, 106 N. E. 524.

What raises doubt in the case at bar is the fact that, although true insurance is involved, the service rendered by plaintiff is not the guaranteeing of mortgages already owned by the applicants for such guaranty, but may be argued to be the procuring for

132 the investing public of sound investments, which incidentally include plaintiff's guaranty. Which is the dominant and which the incidental feature of the business? In the case of one who trades in mortgages, the profit in the transaction is expected to come from the spread in purchase and sale prices. This is not true of plaintiff's business. Its primary purpose in acquiring and disposing of mortgages is not to invest its funds or to sell the mortgages at a profit, but is to dispose of them at their face value accompanied by its guaranty; and it is from the "premium" for such guaranty, together with the fees previously collected from the mortgagor upon the making of the bond and mortgage, that plaintiff's profit is derived. Such fees cover charges for searching the title, and for inspecting and appraising the property, etc. The fees for title examination may be considered as the premium for the guaranty of title contained in the policy that is subsequently to be issued upon plaintiff's disposal of the bond and mortgage. This is none the less title insurance because the word "guarantee" rather than "insure" is used. See Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P. 667. Nor does it matter that the insurance is paid for by one who is not the insured. The fees for inspections, appraisals, etc., may be considered as an incident to the insurance of the mortgage, for it is not an unreasonable incident to the business of guaranteeing mortgages that the insurer should investigate and appraise the property it is to insure. Despite the mounting size of such fees, we think they remain an incident to the guaranty of the mortgage, unless that guaranty itself is to be deemed but incidental to a business of investing in and selling mortgages. In determining which way the business should be viewed, the case of United States v. Cambridge Loan & Bldg. Co., 278 U. S. 55, 49 S. Ct. 39, 73 L. Ed. 180, becomes apposite. There a corporation which by the State law was a building and loan association had power to receive deposits from and make loans to persons who were not members, and the Federal tax officials contended that the exercise of such powers made it in substance a banking institution rather than a "building and loan association" within the exemption from income tax granted by section 231 of the Revenue Acts of 1918 and 1921 (40 Stat. 1076, 42 Stat. 253). But the argument was rejected on the ground that in exempting such associations Congress was speaking of existing societies that commonly were known as such, so that the term included what the States were content to recognize as building and loan associations, unless there was a gross misuse of the name. In the case at bar the State has classified the business done by plaintiff as insurance, though not with absolute consistency, since banking corporations may also sell mortgages with their guaranty. Nevertheless, it has accepted plaintiff as an insurance company and subjects it to supervision by the department of insurance. The departure from insurance is surely no greater than was the departure from the normal business of loan associations in

the Cambridge case. This recognition by the State of the nature of plaintiff's business should turn the scales, if the question hangs in doubt. In our opinion the plaintiff should be deemed an "insurance company" subject to tax under section 246.

There is advanced a further argument against this conclusion based upon the contention that what Congress regarded as an insurance company is indicated by its definition of "gross income" set forth in section 246 and by the deductions therefrom permitted by section 247. It is argued that gross income is to be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners," and that, since no form for an "annual statement" for title and mortgage guaranty companies was approved by the National Convention until long after the taxable years in question, Congress can not have intended to include such corporations within the section. This argument, however, proves too much; for it would exclude companies engaged solely in insuring titles, although such companies are concededly taxable under section 246. See Sol. Mem. 5501 V–1 C. B. 102; G. C. M. 5355 VII–2 C. B. 160. Although section 246 (b) (1) refers to the form of annual statement approved by the National Convention of Insurance Commissioners, other subdivisions of the section proceed to specify how gross and net income are to be computed, so that the absence of such an approved form of annual statement would seem unimportant. See Massachusetts Protective Ass'n v. Commissioner, 18 B. T. A. 810; Western Casualty Co. v. Commissioner, 20 B. T. A. 738.

Moreover, the National Convention has approved forms for
133 "miscellaneous insurance companies," and it is by no means clear that title and mortgage guaranty companies could not fall within this classification. It is said further that not all of plaintiff's income can be classified as "investment income" or "underwriting income" as defined in said section 246, so that our conclusion will result in a large part of its income escaping taxation. This argument rests chiefly upon the premise that the income derived from guaranteeing mortgages can not be deemed "underwriting income" and in the view we take this premise is false. Even if the incidental fees collected for inspections, appraisals, etc., would escape taxation (as to which we express no opinion), it does not follow that plaintiff is not an insurance company within the meaning of section 246. It was not until 1928 that Congress added to the computation of income of insurance companies, other than life or mutual, gain derived from the sale of property (45 Stat. 844, § 204 (b) 1, 26 U. S. C. A. § 2204), yet it could scarcely be maintained that prior to 1928 such companies, if they had any income of this type, were to be excluded from taxation as insurance companies. Cf. John Hancock Mut. Life. Ins. Co. v. Commissioner, 10 B. T. A. 736; Independent Life Ins. Co. v. Commissioner, 17

B. T. A. 757; Massachusetts Protective Ass'n v. Commissioner, 18 B. T. A. 810.

The question presented by this appeal appears to have been presented to the courts in but three other cases. In Lawyers' Mortgage Co. v. Bowers, 34 F.(2d) 504, which we have this day affirmed 49 F.(2d) ——, the District Court decided in favor of the taxpayer. In Louisville Title Co. v. Lucas, 27 F.(2d) 413 (D. C. W. D. Ky.), and Title Guarantee & Trust Co. v. United States (D. C. S. D. Cal.) 49 F.(2d) ——, decided April 29, 1931, the Government prevailed. The latter of these two cases may be distinguished upon its facts, but the former must probably be admitted to be inconsistent with the conclusion we have reached. It should be noted, however, that it was decided prior to the Supreme Court's opinion in United States v. Cambridge Loan & Bldg. Co., supra.

Judgment reversed.

134 In United States Circuit Court of Appeals, Second Circuit

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Judgment

Filed June 8, 1931

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

135 [File endorsement omitted.]

136 [Clerk's certificate to foregoing transcript omitted in printing.]

137 Supreme Court of the United States

Order allowing certiorari

Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And

it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] Enter Attorney General. File No. 36170. U. S. Circuit Court of Appeals, Second Circuit. Term No. 356. The United States of America, petitioner, vs. Home Title Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1931. File No. 36170.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Office Supreme Court, U. S.
FILED
SEP 5 1931
CHARLES ELMORE CROPLEY
CLERK

No. 356

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, PETITIONER

v.

HOME TITLE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

INDEX

	Page
Petition:	
Question presented	1
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Brief in support of the petition:	
Opinions below	7
Jurisdiction	7
Question presented, statutes involved, etc	7
Argument	7
Conclusion	9
Appendix (statutes involved)	11–14

CITATIONS

Cases:	
Bowers v. *Lawyers Mortgage Company*, No. —, October Term, 1931	7, 8, 9
Lawyers Mortgage Co. v. *Bowers*, 50 F. (2d) 104	5
Statutes:	
Revenue Act of 1921, c. 136, 42 Stat. 227, 252, 262, 294—	
Sec. 230	12
Sec. 246	11–12
Sec. 1000	11
Revenue Act of 1924, c. 234, 43 Stat. 253, 282, 290, 325—	
Sec. 230	14
Sec. 246	13–14
Sec. 700	13

74488—31——1

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

HOME TITLE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in this cause on June 8, 1931 (R. 135), reversing the judgment of the District Court for the Eastern District of New York (R. 43–54).

QUESTION PRESENTED

Whether the provisions of Section 246 of the Revenue Acts of 1921 and 1924, providing a special basis for the taxation "of every insurance company

(other than a life or mutual insurance company)" may be availed of by a corporation doing a mortgage guaranty and title insurance business.

STATUTES INVOLVED

These are set out in the Appendix, pp. 11–14, *infra*.

STATEMENT

The respondent, a New York corporation, paid the capital-stock tax imposed upon domestic corporations by Sections 1000 (a) (1) of the Revenue Act of 1921 and by Section 700 (a) (1) of the Revenue Act of 1924, pp. 11, 13, *infra*, for the fiscal years ending June 30, 1923, June 30, 1924, and June 30, 1925. (R. 25, 26, 27.) Subsequently it filed claims for refund of such taxes on the ground that it was an "insurance company" and therefore liable only for the tax imposed by Section 246 (a) (1) of those Acts, pp. 11, 13, *infra*. These claims were rejected (R. 25, 26, 27), whereupon the respondent brought this suit in the District Court (R. 3–13). The case was tried upon stipulated facts, without a jury. (R. 24.)

The respondent is a corporation organized in 1906 under Article V of the Insurance Law of New York relating to title and credit guarantee corporations (Laws 1892, c. 690). As such it has been, and now is, subject to supervision by the State Superintendent of Insurance, to whom it makes annual reports. (R. 25, 27–28.)

The respondent's business since its organization has consisted of the insurance of titles to real estate and the sale of real-estate mortgages guaranteed by itself. (R. 33, 35.) Its mortgage guaranty business was and is carried on as follows: It receives applications for loans secured by first mortgages on real estate. On receiving such an application the respondent makes an appraisal of the security and a search of the title. If these preliminary matters are satisfactory, the respondent prepares and the applicant executes a bond and mortgage. Thereupon the face amount of the loan is paid by the respondent to the applicant, less charges for the appraisal, inspection, and other services rendered, and for recording, and less a fee for title insurance, which is always made a condition of the granting of the loan. (R. 34–35, 38.) Thereafter the bond and mortgage, or certificates of participation therein, are sold or assigned to investors, ostensibly for their face value. When a bond and mortgage are sold the respondent delivers to the investor a "Mortgage Guarantee," called a "policy." (Exhibit N, R. 92–95.) In the case of the sale of a participation certificate (Exhibit O, R. 96–98), there is incorporated in the certificate itself terms corresponding substantially with those in the "Mortgage Guarantee." By the "guarantee," or participation certificate, the purchaser or investor appoints the respondent as his agent to collect the principal and interest on the

bond and mortgage. The respondent guarantees payment of the principal as soon as collected, but in any event within twelve months after the same becomes due, and payment of interest at a specified rate, which is usually one-half of one per cent less than the rate specified in the bond. This difference, called a "premium," is retained by respondent and constitutes the consideration for the sale of the mortgage and its accompanying guaranty, or of the certificate. (R. 35–36, 92–98.)

The respondent does not make loans for its own investment primarily, but for the purpose of ultimate transfer to the general public. In making assignments of bonds and mortgages or of fractional certificates the respondent always enters into the guaranty described. The average length of time between the making of the loans and their subsequent transfer to investors is approximately two months. The interest earned in the intervening period is part of respondent's gross income. (R. 36.)

In conducting its business respondent did not segregate its assets but used them indiscriminately in all its activities. It always kept on hand a sufficient quantity of its bonds and mortgages to maintain the guaranty fund supposedly required by Article V of the New York Insurance Law. (R. 40–41.)

By the law of New York corporations organized under its banking statutes and subject to super-

vision by the State Banking Department may be authorized to do a mortgage guaranty business like that of respondent. During 1921 to 1925, inclusive, at least two companies thus organized and supervised were so engaged. (R. 41–42.)

The District Court held that the respondent was not an "insurance company" within the meaning of Section 246 of the Revenue Acts of 1921 and 1924 and directed judgment in favor of the United States. (R. 54.) Upon appeal to the Circuit Court of Appeals the judgment was reversed. (R. 135.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the respondent was taxable as an "insurance company" under Section 246 of the Revenue Acts of 1921 and 1924.

2. The Circuit Court of Appeals erred in not holding that the respondent was taxable under Sections 230 and 1000 of the Revenue Act of 1921 and Sections 230 and 700 of the Revenue Act of 1924.

REASONS FOR GRANTING THE WRIT

On the same day it decided this case the Circuit Court of Appeals handed down its decision in *Lawyers Mortgage Company* v. *Bowers,* 50 F. (2d) 104, No. —, present term, in which case a petition for certiorari is being filed by the Government simultaneously herewith. The instant case and the *Lawyers Mortgage Company* case present substantially the same question and all the reasons for

granting a writ of certiorari set forth in the Government's petition in the latter case are applicable to the instant case.

Wherefore it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1931.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 43–54) is reported in 41 F. (2d) 793. The opinion of the Circuit Court of Appeals (R. 129–135) is reported in 50 F. (2d) 107.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931. (R. 135.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, specification of errors to be urged, and a statement of the case will be found in the petition. The statutes involved are set out in the Appendix, pp. 11–14, *infra*.

ARGUMENT

For reasons set forth in the brief in support of the Government's petition for certiorari in *Bowers* v. *Lawyers Mortgage Company*, No. —, present term, filed simultaneously herewith, we submit that the decision of the Circuit Court of Appeals in the

instant case is erroneous. The only substantial difference between the two cases is that, unlike the taxpayer in the *Lawyers Mortgage Company* case, the respondent here engages in the practice of insuring titles to real estate in addition to the mortgage guaranty business. We do not believe that this difference justifies the decision that the respondent is an insurance company within the meaning of Section 246 of the Revenue Acts of 1921 and 1924.

So far as respondent's policies of title insurance are issued in connection with, and as a part of, transactions of transfer or sale of its mortgages to the general investing public, we submit, for the reasons set forth in the Government's brief in the *Lawyers Mortgage Company* case in respect of the contracts of guaranty there involved, that they are merely terms or conditions incident to the sale of the mortgages. Whatever conditions respondent may see fit to attach to the sale of its mortgages necessarily are subordinate to the sale itself. Viewed from the standpoint of the investor, insurance of the title of the security behind his purchase, like the guaranty of payment of principal and interest, is merely a feature rendering his investment more attractive than would otherwise be the case.

The fact that the respondent issued policies of title insurance on properties not covered by its own mortgages did not bring the company within the

provisions of Section 246. As pointed out in the brief in the *Lawyers Mortgage Company* case, Congress by that section provided for the taxation on a special basis only of those companies engaged in the insurance business all, or substantially all, of whose income consisted of returns from investments and from underwriting premiums. Profits from sales of mortgages do not fall directly within either of these classes. It is not to be presumed that the Congress intended the exemption of such profits in the hands of a corporation also doing an insurance business but not in the hands of another corporation. Exemptions are not read into the law. The only logical interpretation of the statute is that if a corporation engaged in the business of insurance sees fit to engage in other commercial activities it withdraws itself from the provisions of Section 246 and subjects itself to taxation like commercial corporations generally.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals is erroneous. The question presented is one of general importance in the administration of the tax laws and is raised in a large number of cases now pending in the courts and the Bureau of Internal Revenue. Several District Courts have reached a conclusion contrary to that of the Circuit Court of Appeals.

We respectfully submit that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
J. LOUIS MONARCH,
HAYNER N. LARSON,
Special Assistants to the Attorney General.
PAUL D. MILLER,
Attorney.

SEPTEMBER, 1931.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 252, 262, 294:

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(b) The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section * * * 246.

SEC. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *

(b) In the case of an insurance company subject to the tax imposed by this section—

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred; * * *.

SEC. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount.

Revenue Act of 1924, c. 234, 43 Stat. 253, 282, 290, 325:

SEC. 700. (a) On and after July 1, 1924, in lieu of the tax imposed by section 1000 of the Revenue Act of 1921—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(b) The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section * * * 246. (U. S. C., Title 26, Sec. 223.)

SEC. 246. (a) In lieu of the taxes imposed by sections 230 and 700, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *

(b) In the case of an insurance company subject to the tax imposed by this section—

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the Na-

tional Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends and rents received during the taxable year add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred; * * *. (U. S. C., Title 26, Sec. 1006.)

Sec. 230. In lieu of the tax imposed by section 230 of the Revenue Act of 1921 there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax of 12½ per centum of the amount of the net income, in excess of the credits provided in sections 236 and 263. (U. S. C., Title 26, Sec. 981.)

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Supreme Court, U. S.
FILED
JAN 6 1932
CLERK SUPREME COURT

No. 356

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, PETITIONER

v.

HOME TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of error to be urged	7
Summary of argument	7
Argument	9
Conclusion	14
Appendix	15

CITATIONS

Cases:

Bowers v. *Lawyers Mortgage Co.*, No. 355, October Term, 1931 — 2, 8, 9, 11

Trenton Potteries Co. v. *Title Guaranty & Trust Co.*, 50 App. Div. 490 — 10

Statutes:

Revenue Act of 1921, c. 136, 42 Stat. 227, 262, 294—

Sec. 246 — 2

Sec. 1000 — 2

Revenue Act of 1924, c. 234, 43 Stat. 253, 290, 325—

Sec. 246 (U. S. C., Title 26, sec. 1006) — 2

Sec. 700 (U. S. C., Title 26, sec. 223) — 2

Insurance Law of New York, Art. V, Laws 1892, c. 690 — 4

Miscellaneous:

G. C. M. 5355, C. B. VII–2, p. 160 (1928) — 10

S. M. 5501, C. B. V–1, p. 102 (1926) — 10

G. C. M. 6988, C. B. VIII–2, p. 213 (1929) — 13

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 356

THE UNITED STATES OF AMERICA, PETITIONER

v.

HOME TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 23–29) is reported in 41 F. (2d) 793. The opinion of the Circuit Court of Appeals (R. 65–72) is reported in 50 F. (2d) 107.

JURISDICTION

The judgment sought to be reviewed was entered June 8, 1931. (R. 72.) Petition for certiorari was filed on September 5, 1931, and the writ was granted October 26, 1931. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the provisions of the Revenue Acts of 1921 and 1924 to the effect that the capital stock taxes imposed thereby "shall not apply * * * to any insurance company subject to the tax imposed by section * * * 246" were applicable to the respondent, a corporation carrying on the businesses of title insurance, of making loans on mortgages on real estate, and of selling the loans with its guaranties of the bonds and mortgages securing loans.

STATUTES INVOLVED

The statutes primarily involved are Sections 246 and 1000 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 262, 294, and Sections 246 and 700 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 290, 325. The applicable sections of the Revenue Act of 1921 are printed in Appendix A of the petitioner's brief in *Bowers* v. *Lawyers Mortgage Company,* No. 355, pp. 42–46. Section 246 of the 1924 Act is practically identical with Section 246 of the 1921 Act and Section 700 of the 1924 Act is practically identical with Section 1000 of the 1921 Act.

STATEMENT

The respondent filed capital stock returns for the period from July 1, 1922, to June 30, 1923, and for the period from July 1, 1923, to June 30, 1924. In each of these it described its business as "Real Estate, Title Insurance and Mortgages," and each

of the returns showed a tax to be due. (R. 12–13, Exhibits C and E.) The respondent filed a capital stock tax return for the period from July 1, 1924, to June 30, 1925, in which it described its business as "Title & Mortgage Insurance" and asserted that "insurance companies are exempt from this tax." (R. 13, Exhibit H.) The respondent also duly filed returns for the corporation income tax for the calendar years 1921, 1922, 1923, and 1924. (Exhibits P, Q, R, S.) In each of these it described its business as "Title insurance and Mortgages." The first of these returns was a consolidated return including the income of the two subsidiaries of the respondent, the Home Investment Company of New York and the Jay Holding Corporation. Although the income tax returns reported as income items which we conceive not to be required of insurance companies under the law and the tax was paid on the net income so computed, the respondent raises no question as to its liability for these taxes. But it does contest its liability for the capital stock taxes for the three periods above mentioned. These capital stock taxes were evidently all paid under protest and duress on February 4, 1926. (R. 13–14.) On February 10, 1926, the respondent filed claims for refund of the capital stock taxes for the three periods. (R. 13–14, Exhibits D, F, I.) In these it answered the question "business in which engaged" merely with the words "Title Insurance," and asserted that the company, "being an insur-

ance company, is not liable for a capital stock tax." (R. 12–14.)

The claims were duly rejected (R. 13–14) and the respondent sued the United States in the District Court to recover the capital stock taxes paid. (R. 2–7.) The respondent at no time has questioned the correctness of the amounts collected, if it was liable for this type of tax at all. The case was, of course, tried by the court, without a jury. The parties entered into a stipulation as to the facts, which the court accepted as its findings. (R. 12–22, 29.) It entered judgment for the United States, which the Circuit Court of Appeals reversed. (R. 59, 72.)

The facts as found may be epitomized as follows:

The respondent is a corporation organized in 1906 under Article V of the Insurance Law of New York relating to title and credit guaranty corporations (Laws 1892, c. 690, printed in petitioner's brief in No. 355, at pp. 51–53). As such it has been, and now is, subject to supervision by the State Superintendent of Insurance, to whom it makes annual reports. (R. 12, 14.)

The respondent's business consists of the insurance of titles to real estate and dealing in real estate mortgages, in the manner explained below. (R. 17.) It insures titles to many tracts of real estate as to which no application for a loan is made to it. Its mortgage business is carried on as follows: It receives applications for loans

secured by first mortgages on real estate. On receiving such an application the respondent makes an appraisal of the security and a search of the title. If these preliminary matters are satisfactory, the respondent prepares and the applicant executes a bond and mortgage. Thereupon the face amount of the loan is paid by the respondent to the applicant, less the charges for its services, and for recording, and less a fee for title insurance, which is always made a condition of the granting of the loan. (R. 17–18.) Thereafter the bond and mortgage, or certificates of participation therein, are sold or assigned to investors, for their face value. When a bond and mortgage are sold the respondent delivers to the investor a "Mortgage Guarantee," called a "policy." (Exhibit N, R. 51–53.) In the case of the sale of a participation certificate (Exhibit O, R. 53–54), there is incorporated in the certificate itself terms corresponding substantially with those in the "Mortgage Guarantee."

By the "guarantee" or participation certificate, the purchaser or investor appoints the respondent as his agent to collect the principal and interest on the bond and mortgage. The respondent guarantees payment of the principal as soon as collected, but in any event within twelve months after the same becomes due, and payment of interest at a specified rate, which is usually one-half of one per cent less than the rate specified in the bond. This difference, called a "premium," is retained by

respondent and constitutes the consideration for the sale of the mortgage and its accompanying guaranty, or of the certificate. The policies and certificates also guarantee that the mortgage is a valid first lien upon a good and marketable title in fee to the real estate.

The "guarantee" and participation certificate both cover the assigns of the purchaser. The certificate provides that it may be assigned by endorsement thereon "but only when such assignment is registered on the books of the company," and that the company may cancel the certificate at any time by giving thirty days' notice in writing to the purchaser and paying "the amount owing for principal and interest." (Exhibit O, R. 54.)

The respondent does not make loans for its own investment primarily, but for the purpose of selling the bonds and mortgages. (R. 19.) In making assignments of bonds and mortgages or of fractional certificates the respondent always enters into the guaranty described. The average length of time between the making of the loans and their subsequent transfer to investors is approximately two months. (R. 18.) The interest earned in the intervening period is part of respondent's gross income. It holds or sells no mortgages except those which it acquires and guarantees in the manner above described, and guarantees no mortgages except those over which it has complete control. (R. 17–19.)

In conducting its business respondent did not segregate its assets, but used them indiscriminately in all its activities. It made no segregation on its books of its expenses. It always kept on hand a sufficient quantity of its bonds and mortgages to maintain the guaranty fund supposedly required by Article V of the New York insurance law. (R. 21–22.)

By the law of New York corporations organized under its banking statutes and subject to supervision by the State Banking Department may be authorized to make mortgage loans and to sell them with guarantees. During 1921 to 1925, inclusive, at least two companies thus organized and supervised were so engaged. (R. 22.)

Other factual matters are discussed in the argument.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in not holding that the respondent was taxable under Section 1000 of the Revenue Act of 1921 and Section 700 of the Revenue Act of 1924.

SUMMARY OF ARGUMENT

Sections 1000 of the Revenue Act of 1921 and 700 of the Revenue Act of 1924 imposed a special excise tax on every domestic corporation but also provided that the "taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section * * *

246." The respondent contends, and the Circuit Court of Appeals held, that it was an "insurance company subject to the tax imposed by section 246," and consequently not liable to the capital stock tax. We contend that it was not such a company.

Our position here, as in *Bowers* v. *Lawyers Mortgage Company*, No. 355, October Term, 1931, is that a corporation is not such an insurance company if it derives a substantial portion of its income from a distinctive line of business other than insurance, as that term is commonly understood.

The respondent here, in addition to its business of selling guaranteed mortgages, did a title insurance business. The Bureau of Internal Revenue has ruled that a corporation which derives practically all of its income from premiums on title insurance policies and fees for searches and the like, which are necessarily preliminary to the issuance of such policies, is an insurance company. But a substantial portion of the income of the respondent here came from activities which were not connected with its title insurance business. A considerable percentage arose out of the making of loans on mortgages and sales of bonds and mortgages, with the company's "guarantee," which was the "primary purpose" (R. 19) in the making of loans by respondent. These activities, characteristically those of an investment company, can not be regarded as incidental to the title insurance business.

The judgment of the District Court should be affirmed and the judgment of the Circuit Court of Appeals should be reversed.

ARGUMENT

Section 1000 of the Revenue Act of 1921 and Section 700 of the Revenue Act of 1924 imposed a special excise (capital stock) tax on every domestic corporation but they also provided that the "taxes imposed by this section shall not apply to any insurance company subject to the tax imposed by section * * * 246." Section 246 was substantially the same in each of the Acts. The respondent contends, and the Circuit Court of Appeals held, that it was an "insurance company subject to the tax imposed by section 246," and consequently not liable to the capital stock tax. We contend that it was not such a company.

Our position here, as in *Bowers* v. *Lawyers Mortgage Co.*, No. 355, October Term 1931, is that a corporation is not such an insurance company if it derives a substantial portion of its income from a distinctive line of business other than insurance, as that term is commonly used. (For the argument on this point, see pp. 11–22, in brief of the petitioner in that case.)

The respondent here did a considerable title insurance business. It issued to persons with whom it had no other transactions policies of title insurance, for which it received fixed charges. And

solely as preliminary steps thereto, it examined and prepared abstracts of title and made searches and procured information in relation to the real estate involved. If the title was found to be uninsurable the respondent was reimbursed for its time and expenses in investigating the title, and if the policy was issued the respondent charged not only a premium for the policy based on a scale dependent upon the amount of the policy, but also fees for the preliminary work.

If the respondent had done no other business, it would have been entitled to classification as an insurance company taxable under Section 246. In several cases presenting such a situation the Bureau of Internal Revenue has so ruled. S. M. 5501, C. B. V–1, p. 102; G. C. M. 5355, C. B. VII–2, p. 160. We do not question the correctness of these rulings. See *Trenton Potteries Co.* v. *Title Guaranty & Trust Co.*, 50 App. Div. 490, and authorities there cited.

But the aggregate of all of the premiums and charges mentioned above constituted only about one-half of the gross income of the respondent in any of the years here involved exclusive of interest received.[1] The other one-half arose from the making and selling of mortgage loans.

---

[1] See our tabulation made from an examination of the statements in the reports made by the respondent to the New York Superintendent of Insurance (R. 15–16) and the reallocation of the items made by the respondent itself (R. 19), evidently for the purpose of this case, Appendix, p. 15, *infra*.

The respondent made loans on mortgages and charged the mortgagors fees for its service. It sold substantially all of the mortgages soon after it acquired them, the average period during which it held mortgages before selling them not exceeding two months. When it sold all of a mortgage to a single investor, it issued a so-called "policy of mortgage guarantee," and when it sold the investor only a part interest in a mortgage it issued a document entitled "guaranteed first mortgage certificate." (R. 17–18, Exhibits N and O, R. 51–54.) These documents are very similar to those involved in the case of the *Lawyers Mortgage Co.*

It is true that in the instant case the respondent in its policies and certificates, in addition to its other undertakings, guaranteed "that the said mortgage is a valid first lien upon a good and marketable title in fee to the property." And it is a fact that the respondent in the instant case, before making the loan, examined the title to the property, and, unlike the Lawyers Mortgage Company, it did not take out title insurance in another company. Because of these facts, the respondent has argued that most of the fees which it received from the mortgagors should be considered as compensation for services which are akin to those performed where the company insured the title for one to whom it made no loan. And in the table (R. 19) (evidently prepared for this case) it has artificially allocated to its guaranty as to the mortgage lien about sixty per centum of the fees received from

the mortgagors. The District Court did not consider the propriety of such allocation, and we submit that there is nothing in the findings which requires this Court to accept that allocation or to attribute any significance to it. The guaranty as to the lien added nothing either to the respondent's obligations nor to the investor's protection, because the respondent made the broad promise to make payment both of the principal and interest in any event, and at the same time it sold the mortgage or a share in the mortgage to the purchaser. Moreover, we submit that no fees paid by the borrower can be considered as compensation for a guaranty made to the assignee of the mortgage.

The outstanding significant fact is that the respondent here, like the Lawyers Mortgage Company, was engaged in the business of selling guaranteed mortgages and derived a large part of its income from this business. Its undertakings in the contracts under discussion, whatever their nature, were incidental to the sales of the mortgages. The business of the respondent in respect of guaranteed mortgages was exactly the same kind of a business as that of the Lawyers Mortgage Company, and it can not be that Congress intended to make a distinction between two such companies for purposes of taxation merely because of minor differences in their forms of contract.

If, however, the Court should deem it necessary to examine the items of the respondent's income in

detail, it may be assisted by the following analysis.

The sum total of the fees paid to the respondent by the mortgagors represent in the aggregate a very substantial portion of the respondent's income, ranging from about thirty per centum to forty per centum of the total gross income of the respondent, exclusive of its investment income, etc.[2]

We submit that none of these fees can be attributed to the insurance business. In each year there was a substantial amount of income,[3] consisting of fees and charges paid by the mortgagors, which the respondent has not attempted to allocate to the guaranty as to the mortgage lien. In none of the five years in question did these items aggregate less than one-eighth of the total gross income of the respondent, exclusive of interest, etc. This by itself, we submit, is a sufficient proportion of the gross income to remove the respondent from the class of corporations deriving substantially all of their income from insurance business, even if guaranteeing mortgages be considered insurance. See G. C. M. 6988, C. B. VIII–2, p. 213.

And if, as we contend, the guaranteeing of mortgages is not insurance, about thirty per centum[4] of the income of the respondent in each year was attributable to activities other than insurance, even if we should concede that the respondent's alloca-

[2] See Appendix, p. 15, *infra*.

[3] Items (2) and (5) in respondent's table set forth in the findings. See R. 19–20.

[4] The sum of items (1), (2), and (5) in the table prepared by respondent (R. 19).

tion of income to guaranty of the lien of mortgages sold by it is tenable.

So, even upon the assumptions of the respondent as to the proper allocation of its figures, we contend that it was not an insurance company subject to the tax imposed in Section 246. And *a fortiori*, if any of our contentions as to allocation of its income are correct, it can not be so classified.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed, and the judgment of the District Court should be affirmed.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
J. LOUIS MONARCH,
J. P. JACKSON,
Special Assistants to the Attorney General.
FRANCIS H. HORAN,
Attorney.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
E. H. HORTON,
WALTER W. MAHON,
Special Attorneys,
Bureau of Internal Revenue,
Of Counsel.

JANUARY, 1932.

APPENDIX

Table showing proportion of respondent's income received from various sources

	Total gross income, exclusive of interest received and some small miscellaneous items	Income from all fees and charges applicable to title insurance (apart from transactions in which the respondent made mortgage loans)	Income from fees paid by mortgagors[1]	Interest retained as "premiums" on mortgage guaranties[2]
1921	$630, 291. 01	$270, 030. 79	$248, 864. 33	$90, 449, 14
1922	925. 596. 83	406, 019. 93	376, 899. 25	105, 750. 08
1923	1, 059, 912. 07	565, 155. 86	317, 388. 75	134, 349. 66
1924	1, 160, 895, 92	576, 771. 36	355, 943. 68	175, 641. 39
1925	1, 420, 509. 85	714, 949. 06	416, 355. 15	227, 869. 98

[1] This item represents the sum of items 2, 4, and 5, appearing in the allocation table prepared by the respondent, appearing at R. 19.

[2] This is item 1 shown in this table, there designated as "Income consisting of the difference between the interest received and guaranteed by plaintiff in connection with its mortgage guarantees." (R. 19.)

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

FILED
SEP 26 193
CHARLES ELMORE CRO
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 356.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

HOME TITLE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WEILL, WOLFF & SATTERLEE,
Attorneys for Respondent,
52 William Street,
New York.

HUGH SATTERLEE,
I. HERMAN SHER,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	4
The respondent is an insurance company other than a life or mutual insurance company	4
No special or important reasons exist for a review on writ of certiorari	6
Conclusion	9
APPENDIX—Opinion of the Circuit Court of Appeals in Home Title Insurance Co. *v.* United States, 50 Fed. (2d) 107	10

TABLE OF CASES AND STATUTES.

Burk-Waggoner Oil Association *v.* Hopkins, 269 U. S. 110	8
Lawyers Mortgage Co. *v.* Bowers, 50 Fed. (2d) 104	4
Mortgage Guarantee Company *v.* Welch, 38 Fed. (2d) 184, certiorari denied, 281 U. S. 759	8
Op. Atty. Gen. (1918), 15 N. Y. St. Dept. Rep. 551	3
Weiss *v.* Wiener, 279 U. S. 33	8
Judicial Code, Section 240(a)	1
N. Y. Laws 1914, Chap. 369, as amended	3
Revenue Act of 1921:	
Section 246	1
Section 1000	1
Revenue Act of 1924:	
Section 246	1
Section 700	2
Revenue Act of 1926, Section 1200(a), 44 Stat. 125	7

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 356.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

HOME TITLE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (R. 43-54) is reported in 41 Fed. (2d) 793. The opinion of the Circuit Court of Appeals (R. 129-135) is reported in 50 Fed. (2d) 107, and a copy thereof is appended hereto.

JURISDICTION.

The jurisdiction of this Court is by virtue of Section 240(a) of the Judicial Code, as stated in the petitioner's brief.

QUESTION PRESENTED.

The question presented is whether the respondent was an insurance company subject to the tax imposed by Section 246 of the Revenue Acts of 1921 and 1924, and accordingly not subject to the capital stock tax imposed by Sec-

tion 1000 of the Revenue Act of 1921 and Section 700 of the Revenue Act of 1924.

Statutes Involved.

The statutes involved are set forth in the appendix (pp. 11-14) to the petition of the United States.

Statement.

The petitioner distorts the facts. They have been stipulated (R. 24-42; 85-101), and are fairly presented in the opinion of the Circuit Court of Appeals appended hereto.

The respondent was organized under the Insurance Law of the State of New York. It has always been subject to the supervision of the State Superintendent of Insurance, to whom it makes annual reports (R. 25, 27).

The business of the respondent has always consisted of the insurance of titles to real estate and the guaranty of mortgages on real estate. In this business it has issued two kinds of contracts or policies (R. 33-36; 88-98), namely,

(a) Those in which it merely guarantees the title to real estate; and

(b) Those in which it guarantees (1) the title to the real estate covered by the mortgage and (2) the payment of the principal and interest of the bond and mortgage.

The respondent's gross income consisted of (R. 29, 37):

(a) Fees and charges for (1) the guaranty of titles and (2) the guaranty of the payment of mortgages;

(b) Interest and rent; and

(c) Small miscellaneous income.

The amount of (1) title insurance written by the respondent without guaranty of mortgages, and (2) the

amount of mortgages guaranteed by the respondent, for each of the calendar years 1921 to 1925 were as follows (R. 39):

Year	*Title insurance*	*Mortgage guaranties*
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

The respondent always sold at their face value, without profit, the bonds and mortgages accompanied by its guaranty of payment (R. 34-39; 60-62). What the Solicitor General means (Petition 3) by saying that they are sold to investors "ostensibly" for their face value is unknown.

Under the Banking Law of the State of New York corporations may be authorized to guarantee the payment of mortgages, but not to insure titles to real estate, whether or not in connection with the guaranty of mortgages (N. Y. Laws 1914, Chap. 369, as amended; Op. Atty. Gen. (1918), 15 N. Y. St. Dept. Rep. 551). It is scarcely true, therefore, as alleged by the Solicitor General (Petition 4 and 5), that by the law of New York corporations organized under its banking statutes may be authorized to do a mortgage guaranty business "like that of respondent". The Solicitor General's statement is also incorrect (Petition 5) that at least two companies thus organized under the Banking Law "were so engaged". As shown by the transcript of record (pp. 41 and 42) the two companies referred to, although engaged in the business of making mortgage loans and selling mortgages, in part with and in part without their guaranty, did not insure the title to the property covered by the mortgages, such insurance being secured from title insurance companies.

Contrary to the assertion of the Solicitor General (Petition 5 and 6), the present case and the case of *Lawyers Mortgage Company* v. *Bowers*, in which the Government has also applied for a writ of certiorari, do not present substantially the same question. Part of the business of the Lawyers Mortgage Company consisted of the guaranty of mortgages, but none of its business consisted of title insurance. (*Bowers* v. *Lawyers Mortgage Co.*, R. 22, 44.)

Argument.

The respondent is an insurance company other than a life or mutual insurance company.

Section 1000 of the Revenue Act of 1921 and Section 700 of the Revenue Act of 1924 provide that the capital stock taxes thereby imposed shall not apply to any insurance company subject to the tax imposed by Section 246. Section 246 of both Acts provides for a tax upon the net income "of every insurance company (other than a life or mutual insurance company)". It is agreed that the respondent is not a life or mutual insurance company. If, therefore, the respondent is an insurance company, it is not subject to the capital stock taxes under the 1921 and 1924 Acts.

The respondent's name is "Home Title Insurance Company". It was organized under the Insurance Law of the State of New York. It has always made reports to the Superintendent of Insurance and otherwise complied with the provisions of the Insurance Law. Certainly, so far as the State of New York is concerned, it is clear that the respondent is regarded both popularly and legally as an insurance company (R. 25, 27).

The respondent could not conduct its business if it were not organized under the Insurance Law. It could neither

insure titles to real estate on which it took no mortgages, nor insure titles to real estate on which it took mortgages and guaranteed the payment thereof. To be sure, if the respondent were organized under the Banking Law it could guarantee the payment of mortgages sold by it, but it would be required to secure from a title insurance company insurance of the title to the real estate covered by the mortgages.

It is immaterial that there may be an overlapping of powers in the case of corporations organized under the Insurance Law and those organized under the Banking Law. Certainly an insurance company is no less an insurance company because it does certain things which other corporations might do. The respondent made no profit from the loan of money on mortgages and the sale of such mortgages. It made the loans and sold the mortgages in order that it might receive fees for title insurance and for its guaranty of the payment of the principal and interest of the mortgages (R. 35, 36).

For his reasons for contending that the decision of the Circuit Court of Appeals in the present case is erroneous the Solicitor General refers to his brief in support of his petition for a writ of certiorari in the Lawyers Mortgage Company case. Aside from the consideration that the petition for writ of certiorari in the present case is accordingly supported only by reference to an entirely separate case, the arguments advanced by the Solicitor General in his brief in the Lawyers Mortgage Company case are largely irrelevant as applied to the respondent herein.

However, the Solicitor General adds to his reference to his petition in the Lawyers Mortgage Company case two paragraphs which illustrate the character of his reasoning. He asserts (Petition 8) that so far as respondent's policies of title insurance are issued in connection with the

sale of its mortgages, they are merely terms or conditions incident to the sale of the mortgages and that, viewed from the standpoint of the investor, insurance of the title of the security, like the guaranty of payment of principal and interest, is merely a feature rendering his investment more attractive than would otherwise be the case. Obviously the standpoint of the investor is immaterial. The question is whether from the standpoint of the respondent it is in business to secure fees and charges from the insurance of titles and the guaranty of mortgages or to derive a profit from the sale of mortgages. As on the agreed facts the respondent derives no profit from the sale of mortgages (R. 35), the answer is not difficult.

In his second paragraph (Petition 9) the Solicitor General argues that profits from sales of mortgages do not fall directly within insurance income and that it is not to be presumed that the Congress intended the exemption of such profits in the hands of a corporation also doing an insurance business, but not in the hands of another corporation. As the record is clear that the respondent derived no profits from sales of mortgages, this argument does not seem to advance the Government's position.

NO SPECIAL OR IMPORTANT REASONS EXIST FOR A REVIEW ON WRIT OF CERTIORARI.

Aside from his reference to the Government's brief in the Lawyers Mortgage Company case, the Solicitor General, in meeting the requirement that a review on writ of certiorari will be granted only where there are special and important reasons therefor, states merely (Petition 9) that the question presented is one of general importance in the administration of the tax laws and is raised in a large number of cases now pending in the courts and in the

Bureau of Internal Revenue, and further that several District Courts have reached a conclusion contrary to that of the Circuit Court of Appeals.

So far as counsel have been able to ascertain, there have been only two decisions of District Courts on the exemption of insurance companies from capital stock taxes, other than the decisions of the District Courts of the Southern and Eastern Districts of New York from which the appeals in the Lawyers Mortgage Company case and the present case were taken to the Circuit Court of Appeals for the Second Circuit. These two other decisions are referred to in the opinion of the Circuit Court of Appeals herein (Appendix 18). The Government attempts to cite no further decisions. No other Circuit Court of Appeals has rendered a decision in the matter.

As the capital stock tax was repealed by the Revenue Act of 1926 (R. A. 1926, Section 1200(a), 44 Stat. 125), the issue in the present case could arise only under the Revenue Acts of 1921 and 1924. It is accordingly not surprising, although significant, that the litigated cases have been so few in number.

To be sure, in his petition in the Lawyers Mortgage Company case (pp. 6 and 7) the Solicitor General indicates that the question, broadly speaking, whether mortgage guaranty companies are taxable as insurance companies, is involved in a number of cases before the District Courts and the Board of Tax Appeals, as well as in claims pending in the Bureau of Internal Revenue. Again it is significant, that although, as stated by the Solicitor General, all the Revenue Acts, beginning with the Act of 1921, make special provision for the taxation of insurance companies, none of the many cases in litigation other than the four

above referred to has yet been decided by a District Court or by the Board of Tax Appeals.

Further referring to the Solicitor General's petition in the Lawyers Mortgage Company case (pp. 7 and 8), the Solicitor General goes far afield in claiming that the cases of *Mortgage Guarantee Company* v. *Welch*, 38 Fed. 184, certiorari denied 281 U. S. 759, involving the stamp tax on corporate securities, and *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110, and *Weiss* v. *Wiener*, 279 U. S. 33, have a bearing on the issues in the present case.

So far from there being special and important reasons here for a review on writ of certiorari, the question involved in the present case is largely one of fact, namely, whether the respondent's business is sufficiently insurance to call for its classification as an insurance company. The business of the Lawyers Mortgage Company is materially different from that of the respondent, and the question in the Lawyers Mortgage Company case is also whether or not its business is sufficiently insurance to call for its classification as an insurance company.

It happens that the Circuit Court of Appeals held in both cases that both companies, although conducting different kinds of business, were nevertheless both insurance companies. If this Court should grant writs of certiorari and should hold that either or neither of the two companies was an insurance company, such a decision would not necessarily control the possible cases (whether those referred to by the Solicitor General or others) of many other companies, the nature of whose business varied in kind and degree from either that of the Lawyers Mortgage Company or that of the present respondent.

CONCLUSION.

Because the respondent is an insurance company, as held by the Court below, and because the United States has failed to show special and important reasons for a review on writ of certiorari of the present case, either in the Solicitor General's brief in support of a writ in the present case or by reference to his brief in support of a writ in the Lawyers Mortgage Company case, the petition should be denied.

September 28, 1931.

Respectfully submitted,

WEILL, WOLFF & SATTERLEE,
Attorneys for the Respondent,
52 William Street, New York.

HUGH SATTERLEE,
I. HERMAN SHER,
Of Counsel.

Appendix.

Opinion of the Circuit Court of Appeals.

(*Home Title Insurance Co.* v. *United States*, 50 Fed. (2d) 107)

Swan, Circuit Judge.

This is a suit brought in the District Court pursuant to section 24 of the Judicial Code, 28 USCA §41 (20), for the recovery of capital stock taxes. The taxes in litigation were legally collected if the plaintiff was taxable under section 1000 of the Revenue Act of 1921 (42 Stat. 294) in respect to the taxable years 1923 and 1924, and under section 700 of the Revenue Act of 1924 (43 Stat. 325 (26 USCA §223 note)) in respect to the taxable year 1925, but were illegally collected if the plaintiff was an "insurance company subject to the tax imposed by section 246" of said Revenue Acts (42 Stat. 262; 43 Stat. 290). The court below ruled that it was not an "insurance company" within the meaning of the section last mentioned. The correctness of that ruling is presented by this appeal.

The plaintiff was incorporated in 1906 under article 5 of the Insurance Law of the State of New York pertaining to title and credit guaranty corporations. New York Laws 1892, c. 690. It is subject to, and has complied with, the regulations of the insurance department of the state, and has regularly filed the annual reports required by law to be filed with the state superintendent of insurance. Its business consists in the insurance of title to real estate and the guaranteeing of real estate mortgages. Because of the government's contention, which prevailed below, that the plaintiff is not "an insurance company," it is necessary to state in some detail how its business is conducted.

Plaintiff's practice with respect to title insurance is as follows: Upon receiving an application for title insurance, plaintiff searches the record title of the real estate in question, and, if the title is found satisfactory, issues its "Policy

of Title Insurance'' in a stated amount against loss due to defect in title. As consideration therefor, it receives payment of its charges for the examination of title; such charges being in accordance with a fixed scale of rates based on the amount of the policy. If the title is disapproved, no policy is issued, but plaintiff collects from the applicant its charges for the examination of title at the same rate as if the policy had been issued in the amount applied for.

Plaintiff's practice in connection with guaranteeing mortgages involves the making of loans by it secured by mortgage on real estate. Upon receipt of an application for a mortgage loan, plaintiff not only searches the title, but makes an inspection and appraisal of the property in question. If the title and the value of the security are found satisfactory, plaintiff prepares a bond and mortgage to be executed by the applicant, and, after recordation of the mortgage, pays the applicant the face amount of the bond less its charges for title examination, appraisal, etc. Thereafter the bond and mortgage are sold by plaintiff, principally to savings banks and insurance companies which apply to it for guaranteed loans, for the face value thereof, accompanied by plaintiff's ''policy'' of guaranty, the purchaser agreeing that the plaintiff shall collect the interest and principal of the bond and mortgage and shall retain as compensation all interest collected in excess of the rate guaranteed, which is usually one-half of one per cent. less than the interest rate expressed in the bond. This excess of interest collected by the plaintiff constitutes the consideration or ''premium'' for its ''policy''. By the terms of its policy plaintiff ''guarantees'' to the purchaser, and to subsequent owners of the bond and mortgage, payment at the guaranteed rate of the interest when due under the terms of the bond and mortgage; payment of the principal thereof when collected, and in any event within twelve months after the same becomes due; that the mortgage is a valid first lien upon a marketable title in fee to the premises described; to enforce prompt payment of fire insur-

ance premiums, taxes, and water rates; and to conduct "without expense to the insured" any litigation involving the bond and mortgage or plaintiff's guaranty. By accepting the policy the insured appoints plaintiff his agent to collect the interest and principal, and agrees to facilitate any litigation plaintiff may engage in respecting the bond and mortgage, to assign the same to plaintiff upon receiving from it payment in full after maturity, and to allow plaintiff to retain from the interest collected its aforesaid "premium". Sometimes, instead of disposing of the bond and mortgage in its entirety, plaintiff sells participations therein and issues what it calls "guaranteed first mortgage certificates". Such a certificate combines an assignment of an undivided part interest in a specified bond and mortgage with a guaranty similar in terms to the regular guaranty policy as to payment of interest and principal of the mortgage, which plaintiff "certifies" is a valid first lien upon the property therein described. Substantially all mortgage loans are disposed of soon after plaintiff acquires them; the average period during which it holds a mortgage before selling it not exceeding two months. The primary purpose of plaintiff in making loans on bonds and mortgages has not been for investment, but for sale guaranteed as aforesaid.

During the taxable years here in question all plaintiff's capital, surplus, and undivided profits were employed indiscriminately in its business activities, and no segregation was made on its books of account of its expenses as between that portion of its business described as insurance of titles and that portion described as guaranteeing mortgages. Without attempting to determine exactly how much of plaintiff's income should be allocated to insurance of titles and how much to guaranteeing of mortgages (the parties not being in agreement), it will suffice to state that a very substantial part of its income is derived from the latter phase of its business.

Under the law of the State of New York, corporations organized under the Banking Laws of the state (Consol.

Laws N. Y. c. 2) and subject to supervision of the banking department are authorized to make mortgage loans and sell the same with their guaranty, and the record discloses that during the years in question two such corporations were regularly engaged in substantially the same manner as was the plaintiff in selling to the investing public mortgages and participations in mortgages guaranteed by them, except that they did not guarantee title to the mortgaged premises.

(1) If plaintiff's business consisted solely in the insurance of titles, the government would apparently concede that it was an insurance company subject to tax under section 246. See Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355 VII-2 C. B. 160. But it is contended that the guaranteeing of mortgages is not insurance, and the court below so held. The argument runs that a guaranty, i.e., the promise to pay the debt of another, cannot be insurance, because it is not a contract of indemnity. Speaking generally, it may be said that a contract of insurance is a contract of indemnity, and many authorities might be cited containing statements to this effect. See United States *v.* Supplee-Biddle Hardware Co., 265 U. S. 189, 195, 44 S. Ct. 546, 68 L. Ed. 970; Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 502, 43 N. E. 293, 52 Am. St. Rep. 528; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 31, 54 Am. Dec. 309. The statement is true if it means that the insured must have some interest at risk, for otherwise the contract is a wager; but it is not true if construed to mean that the insured can never collect from the insurer more than his actual loss (Empire Development Co. *v.* Title Guarantee & Trust Co., 225 N. Y. 53, 58, 121 N. E. 468), or that the insured must first salvage what he can and then look to the insurer only for the difference. As is well known, it is the common practice of fire and marine insurers to pay in full and take over the physical remnants of the insured property in the event of injury sufficient to constitute a "total loss." They do not indemnify the insured in the sense required by the defendant's argument; rather they pay upon the happening

of the condition specified in the policy, and themselves work out the salvage. Similarly, a policy of credit insurance would surely be no less insurance because the contract provided that upon the debtor's default the insurer would pay in full and take over the claim for collection. See Dane *v.* Mortgage Ins. Co., (1894) 1 Q. B. 54; Shaw *v.* Royce, (1911) 1 Ch. 138. This is in substance what the plaintiff agrees to do in its policies of mortgage guaranty. If the mortgagor pays, the plaintiff will remit as soon as collected, reserving its "premium" from the interest, but in any event it will pay on the date specified in its "policy." It bears the risk of noncollection from the mortgagor.

(2) It may be important at times to distinguish between contracts of "guaranty", "suretyship", or "indemnity", where the rights of the parties to the contract are involved. But where, as here, the question is whether a company engaged in the business of issuing such contracts in large numbers is doing a business of insurance, the answer is not to be found in technical differences of surety and guarantor. There is no hard and fast line between contracts of insurance and contracts of guaranty. Frost, Law of Guaranty Insurance (2d Ed.), 16; Hunt *v.* New Hampshire Fire Underwriters' Ass'n, 68 N. H. 305, 308, 38 A. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602. Insurance differs from guaranty only as the business of insurance differs from a single contract of guaranty, suretyship, or indemnity. The business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it. As this court said in Tebbets *v.* Mercantile Credit Guarantee Co., 73 F. 95, at page 97, in respect to credit insurance: "Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such

restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

(3) Guaranteeing the payment of mortgages bears a close analogy to credit insurance, and to fidelity insurance as practiced by corporate sureties for profit. See Town of Whitestown *v.* Title Guaranty & Surety Co., 72 Misc. Rep. 498, 131 N. Y. S. 390, affirmed 209 N. Y. 512, 102 N. E. 1115; State *v.* Chicago Bonding & Surety Co., 279 Mo. 535, 215 S. W. 20; Young *v.* Am. Bonding Co., 228 Pa. 373, 77 A. 623; Philadelphia Casualty Co. *v.* Fechheimer, 220 F. 401, 417, Ann. Cas. 1917D, 64 (C. C. A. 6). If the sole service rendered by a corporation consisted in guaranteeing the payment of mortgages upon application by the mortgagees, it would seem to us perfectly clear that the business was truly "insurance". See People *v.* Potts, 264 Ill. 522, 528, 106 N. E. 524.

What raises doubt in the case at bar is the fact that, although true insurance is involved, the service rendered by plaintiff is not the guaranteeing of mortgages already owned by the applicants for such guaranty, but may be argued to be the procuring for the investing public of sound investments, which incidentally include plaintiff's guaranty. Which is the dominant and which the incidental feature of the business? In the case of one who trades in mortgages, the profit in the transaction is expected to come from the spread in purchase and sale prices. This is not true of plaintiff's business. Its primary purpose in acquiring and disposing of mortgages is not to invest its funds or to sell the mortgages at a profit, but is to dispose of them at their face value accompanied by its guaranty; and it is from the "premium" for such guaranty, together with the fees previously collected from the mortgagor upon the making of the bond and mortgage, that plaintiff's profit is derived. Such fees cover charges for

searching the title, and for inspecting and appraising the title, and for inspecting and appraising the property, etc. The fees for title examination may be considered as the premium for the guaranty of title contained in the policy that is subsequently to be issued upon plaintiff's disposal of the bond and mortgage. This is none the less title insurance because the word "guarantee" rather than "insure" is used. See Title Ins. & Trust Co. *v.* City of Los Angeles, 61 Cal. App. 232, 214 P. 667. Nor does it matter that the insurance is paid for by one who is not the insured. The fees for inspections, appraisals, etc., may be considered as an incident to the insurance of the mortgage, for it is not an unreasonable incident to the business of guaranteeing mortgages that the insurer should investigate and appraise the property it is to insure. Despite the mounting size of such fees, we think they remain an incident to the guaranty of the mortgage, unless that guaranty itself is to be deemed but incidental to a business of investing in and selling mortgages. In determining which way the business should be viewed, the case of United States *v.* Cambridge Loan & Bldg. Co., 278 U. S. 55, 49 S. Ct. 39, 73 L. Ed. 180, becomes apposite. There a corporation which by the state law was a building and loan association had power to receive deposits from and make loans to persons who were not members, and the federal tax officials contended that the exercise of such powers made it in substance a banking institution rather than a "building and loan association" within the exemption from income tax granted by section 231 of the Revenue Acts of 1918 and 1921 (40 Stat. 1076, 42 Stat. 253). But the argument was rejected on the ground that in exempting such associations Congress was speaking of existing societies that commonly were known as such, so that the term included what the states were content to recognize as building and loan associations, unless there was a gross misuse of the name. In the case at bar the state has classified the business done by plaintiff as insurance, though not with absolute consistency, since banking corporations may also sell mortgages with their guaranty.

Nevertheless, it has accepted plaintiff as an insurance company and subjects it to supervision by the department of insurance. The departure from insurance is surely no greater than was the departure from the normal business of loan associations in the Cambridge case, This recognition by the state of the nature of plaintiff's business should turn the scales, if the question hangs in doubt. In our opinion the plaintiff should be deemed an "insurance company" subject to tax under section 246.

(4) There is advanced a further argument against this conclusion based upon the contention that what Congress regarded as an insurance company is indicated by its definition of "gross income" set forth in section 246 and by the deductions therefrom permitted by section 247. It is argued that gross income is to be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners," and that, since no form for an "annual statement" for title and mortgage guaranty companies was approved by the National Convention until long after the taxable years in question, Congress cannot have intended to include such corporations within the section. This argument, however, proves too much; for it would exclude companies engaged solely in insuring titles, although such companies are concededly taxable under section 246. See Sol. Mem. 5501 V-1 C. B. 102; G. C. M. 5355 VII-2 C. B. 160. Although section 246 (b) (1) refers to the form of annual statement approved by the National Convention of Insurance Commissioners, other subdivisions of the section proceed to specify how gross and net income are to be computed, so that the absence of such an approved form of annual statement would seem unimportant. See Massachusetts Protective Ass'n *v.* Commissioner, 18 B. T. A. 810; Western Casualty Co. *v.* Commissioner, 20 B. T. A. 738. Moreover, the National Convention has approved forms for "miscellaneous insurance companies", and it is by no means clear that title and mortgage guaranty companies

could not fall within this classification. It is said further that not all of plaintiff's income can be classified as "investment income" or "underwriting income" as defined in said section 246, so that our conclusion will result in a large part of its income escaping taxation. This argument rests chiefly upon the premise that the income derived from guaranteeing mortgages cannot be deemed "underwriting income" and in the view we take this premise is false. Even if the incidental fees collected for inspections, appraisals, etc., would escape taxation (as to which we express no opinion), it does not follow that plaintiff is not an insurance company within the meaning of section 246. It was not until 1928 that Congress added to the computation of income of insurance companies, other than life or mutual, gain derived from the sale of property (45 Stat. 844, §204 (b) 1, 26 USCA §2204), yet it could scarcely be maintained that prior to 1928 such companies, if they had any income of this type, were to be excluded from taxation as insurance companies. *Cf.* John Hancock Mut. Life Ins. Co. *v.* Commissioner, 10 B. T. A. 736; Independent Life Ins. Co. *v.* Commissioner, 17 B. T. A. 757; Massachusetts Protective Ass'n *v.* Commissioner, 18 B. T. A. 810.

The question presented by this appeal appears to have been presented to the courts in but three other cases. In Lawyers' Mortgage Co. *v.* Bowers, 34 F. (2d) 504, which we have this day affirmed, 50 F. (2d) 104, the District Court decided in favor of the taxpayer. In Louisville Title Co. *v.* Lucas, 27 F. (2d) 413 (D. C. W. D. Ky.), and Title Guarantee & Trust Co. *v.* United States (D. C. S. D. Cal.) 49 F. (2d) 641, decided April 29, 1931, the government prevailed. The latter of these two cases may be distinguished upon its facts, but the former must probably be admitted to be inconsistent with the conclusion we have reached. It should be noted, however, that it was decided prior to the Supreme Court's opinion in United States *v.* Cambridge Loan & Bldg. Co., *supra.*

Judgment reversed.

FILE COPY

FILED
JAN 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 356.

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

HOME TITLE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

SATTERLEE & SPENCE,
Attorneys for the Respondent,
52 William Street,
New York.

HUGH SATTERLEE,
I. HERMAN SHER,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Summary of argument	7
Argument	9
I. The respondent was organized and has always operated as an insurance company under the Insurance Law of the State of New York and could not issue any of its policies if not so organized and operated	9
II. The fact that the State of New York recognizes and regulates the respondent as an insurance company and its business as insurance controls the respondent's classification as an insurance company	11
III. The respondent derived most of its net income from title insurance	13
A. The sums which the respondent received for guaranteeing titles and for services and disbursements necessary or incidental thereto were for insurance	13
B. Most of the respondent's net income consisted of sums received by it for guaranteeing titles and for services and disbursements necessary or incidental thereto, and its net income from the guaranty of mortgages was of minor importance	14
C. The respondent derived no income from its loans on and sales of mortgages except as incidental to its guaranties	20
IV. Substantially all of the respondent's income was subject to tax under Section 246 of the 1921 and 1924 Acts	22

PAGE

A. If the respondent's receipts from the guaranty of mortgages were from insurance, all of its income was subject to tax under Section 246.... 22

B. Even if the respondent's receipts from the guaranty of mortgages were not from insurance, substantially all of its income would still be subject to tax under Section 246..... 22

V. Section 246 of the 1921 and 1924 Acts is applicable to all insurance companies other than life or mutual insurance companies, whether or not all of their income is taxable thereunder..... 24

A. The statutes do not define insurance companies taxable under Section 246, but include in its application every insurance company other than a life or mutual insurance company..... 24

B. Insurance companies other than life or mutual insurance companies are taxable under Section 246 even though they receive income not taxable thereunder..... 26

VI. The respondent's guaranty of the payment of mortgages constitutes insurance..... 37

A. The respondent guarantees the payment of the debts of mortgagors and bears the risk of noncollection from them, for which it receives a premium 38

B. The respondent's guaranty of payment constitutes a contract of suretyship..... 40

C. Because the respondent is a corporate surety for profit with respect to its guaranties of payment, such guaranties constitute insurance..... 42

D. The respondent's guaranty of payment is a contract of indemnity in the sense in which indemnity is essential to a contract of insurance 44

E. Congress has itself classified the guaranty of mortgages as insurance and has taxed mortgage guaranty policies as insurance policies.... 45

Conclusion 46

Appendix A—Sections of New York Insurance Law..... 47

Appendix B—Legislative history of Sections 243 and 246.... 52

Table of Cases.

	PAGE
Adair Realty & Trust Co., *In re*. 35 Fed. (2d) 531	42
Alliance Ins. Co. of Philadelphia *v.* MacLaughlin, 49 Fed. (2d) 361, 362	27
Allin *v.* Motorist's Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19	40
Barney *v.* Bond & Mortgage Guarantee Co., 118 Misc. (N. Y.) 241, 193 N. Y. Supp. 19	39
Black Co. *v.* London Guarantee & Accident Co., 216 N. Y. 560, 563	20
Bowers *v.* Lawyers Mortgage Company, No. 355, October Term, 1931	6
Community Bldg. Co. *v.* Maryland Casualty Co. (C. C. A.), 8 Fed. (2d) 678	40
Cumpston *v.* McNair (1828), 1 Wend. (N. Y.) 457	41
Davis *v.* Wells (1881), 104 U. S. 159	41
Dayton Rubber Mfg. Co. of Delaware *v.* Sabra, (C. C. A.), 31 Fed. (2d) 9	40, 42
First Nat. Bank *v.* Jones, 219 N. Y. 312	42
Gans *v.* McGowan, 41 App. Div. 461	39
Gibbs *v.* Common (1822), 9 Searg. & Rawle (Pa.) 198, 201	41
Gindre *v.* Kean, 7 Misc. 582, 28 N. Y. Supp. 4, 5	39
John Hancock Mutual Life Ins. Co. *v.* Commissioner of Internal Revenue, 10 B. T. A. 736	33
Home Title Insurance Company *v.* United States, 50 Fed. (2d) 107	21, 42, 44
Hunt *v.* New Hampshire Fire Underwriters Ass'n, 68 N. H. 305, 38 Atl. 145, 147	38
Independent Life Insurance Co. *v.* Commissioner of Internal Revenue, 17 B. T. A. 757	33
Loeb *v.* Hellman, 83 N. Y. 601, 602-603	39
Loos *v.* McCormack, 107 App. Div. 8, 93 N. Y. Supp. 1088	39, 42
Lumber Mutual Fire Insurance Co. *v.* Malley, 44 Fed. (2d) 553	26
Massachusetts Protective Ass'n, Inc. *v.* Commissioner, 18 B. T. A. 810	32, 35
Miller *v.* Reinhart, 119 N. Y. 368, 378-379	39
Mortgage Guarantee Co. *v.* Welch, 38 Fed. (2d) 184	37

PAGE

Northwestern Mutual Life Ins. Co. *v.* Roberts, 177 Cal. 540, 171 Pac. 313, 314 26

Oxford Bank *v.* Haynes (1825), 25 Mass. (8 Pick.) 423, 428 .. 41

Pan-American Bank & Trust Co. *v.* National City Bank, 6 Fed. (2d) 762, certiorari denied 269 U. S. 554 40
People v. Potts, 264 Ill. 522, 106 N. E. 524 ..... 38, 43
People *v.* Rose, 174 Ill. 310, 51 N. E. 246 43
Peterson *v.* Miller Rubber Co. of New York (C. C. A.) 24 Fed. (2d) 59, 61 41

Ramsey & Gatlin Construction Co., *et al. v.* Vincennes Bridge Co., 283 U. S. 796 40

State *v.* Chicago Bonding & Surety Co., 279 Mo. 535, 215 S. W. 20, 25 43
State *v.* McAvoy, 40 R. I. 437, 450-452, 101 Atl. 109 40
Sturtevant Co., B. F. *v.* Fidelity & Deposit Co. of Maryland, 285 Fed. 367 40

Tidewater Coal Exchange, Inc. *v.* New Amsterdam Casualty Co., 20 Fed. (2d) 951 43
Town of Whitestown *v.* Title Guaranty & Sur. Co., 72 Misc. Rep. 498, 131 N. Y. S. 390, 393 (aff'd. 148 App. Div. 900, which was aff'd 209 N. Y. 12) 43
Transcontinental Petroleum Co. *v.* Interocean Oil Co., 262 Fed. 278, 283 41
Trenton Potteries Co. *v.* Title Guarantee & Trust Co., 50 App. Div. 490, 64 N. Y. Supp. 116, 117 10

United States *v.* Cambridge Loan & Building Co., 278 U. S. 55 12

Wallace *v.* Castle, 14 Hun 106 39
Wayne Oil Tank & Pump Co. *v.* Stoltz, 163 N. Y. Supp. 601 42
Western Casualty Co. *v.* Commissioner, 20 B. T. A. 738 33

Young *v.* American Bonding Co., 228 Pa. 373, 77 Atl. 623 43

STATUTES.

Insurance Law of the State of New York:

Article 5 9
Section 1 48
Section 2 49
Section 10 49

	PAGE
Section 11	49
Section 21	50
Section 24	50
Section 39	50
Section 44	50
Section 170	9, 47
Section 176	47
Judicial Code, Section 128 (a)	1
New York Laws 1914, Chap. 369	6
Revenue Act of 1909, Section 38, 36 Stat. 112	28
Revenue Act of 1913, Section G, 38 Stat. 114, 166	28
Revenue Act of 1916, Section 10, c. 463, 39 Stat. 756	28
Revenue Act of 1916, Section 12, c. 463, 39 Stat. 756	28
Revenue Act of 1917, Section 1206, 40 Stat. 300	28
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Section 1	28
Section 230 (a)	28
Section 231 (4)	11
Section 232	28
Section 233 (a)	28
Section 503 (c)	45
Title XI, Schedule A	45
Revenue Act of 1921, c. 136, 42 Stat. 227:	
Section 231 (4)	11
Section 242	25
Section 243	2, 24, 25
Section 244	25
Section 245	25
Section 246	1, 2, 24, 25
Section 247	2, 3, 25
Section 1000	2, 24, 25
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Section 242	25
Section 243	2, 24, 25
Section 244	25
Section 245	25
Section 246	1, 2, 24, 25
Section 247	2, 25
Section 700	2, 24, 25
Revenue Act of 1928, Section 204 (b) (1) (B), c. 852, 45 Stat. 791	27

REGULATIONS AND MISCELLANEOUS.

	PAGE
Regulations 33 (revised), Paragraph 673	28
Regulations 33 (revised), Paragraph 674	28
Regulations 45, Art. 548	28
Conference Report on the Revenue Bill of 1918, 65th Cong., 3rd Sess., House Rep. No. 1037, p. 60	29
Conference Report on the Revenue Bill of 1921, 67th Cong., 1st Sess., House Rep. No. 486, pp. 39-41	30, 59
Cong. Record, 67th Cong., 1st Sess., Vol. 61, pp. 6982-6983	30
Hearings before the Committee on Ways and Means, House of Representatives, 65th Cong., 2d Sess., on the proposed Revenue Act of 1918, Part I, pp. 791-843, including memorandum on behalf of 111 life insurance companies	29, 52
Hearings before the Committee on Finance of the Senate on the proposed Revenue Act of 1921, 67th Cong., 1st Sess.—Statement on behalf of the Association of Life Insurance Presidents, p. 594	29, 58
House Report, 67th Cong., 1st Sess., No. 350, p. 14	30
G. C. M. 5355, VII-2 C. B. 160	13, 14, 32, 36
I. T. 1981, III-1 C. B. 311	36
Op. Atty. Gen. (1893) 308 (N. Y.)	10
Op. Atty. Gen. (1912) 345 (N. Y.)	10
Op. Atty. Gen. (1918) 15 St. Dept. Rep. 551 (N. Y.)	6, 10
Proceedings of the Fourteenth Annual Meeting of Life Insurance Presidents, pp. 140-141, 143-145	29
Radin on Guaranty and Suretyship, 17 California Law Review 605-622, 18 id. 21-30	41
Report of Committee on Finance of the Senate on the proposed Revenue Act of 1921, 67th Cong., 1st Sess., Senate Report No. 275, p. 20	59
Senate Report, 65th Cong., 3rd Sess., No. 617, p. 9	29
Sol. Mem. 5501, V-1 C. B. 102	13, 19, 22, 23, 32, 36

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 356.

THE UNITED STATES OF AMERICA, Petitioner,

v.

HOME TITLE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 23-29) is reported in 41 Fed. (2d) 793. The opinion of the Circuit Court of Appeals (R. 65-72) is reported in 50 Fed. (2d) 107.

JURISDICTION.

The jurisdiction of this Court is by virtue of Section 240(a) of the Judicial Code, as stated in the petitioner's brief.

QUESTION PRESENTED.

The question presented is whether the respondent was an insurance company (other than a life or mutual insurance company) and accordingly subject to the tax imposed by Section 246 of the Revenue Acts of 1921 and 1924, and consequently was not subject to the capital stock tax im-

posed by Section 1000 of the Revenue Act of 1921 and by Section 700 of the Revenue Act of 1924.

STATUTES INVOLVED.

The statutes involved are Sections 1000, 243, 246 and 247 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227), and Sections 700, 243, 246 and 247 of the Revenue Act of 1924 (Ch. 234, 43 Stat. 253), which are respectively similar to the corresponding provisions of the 1921 Act.

Sections 1000, 243, 246 and 247 of the Revenue Act of 1921 are in part as follows:

> SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—
>
> (1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included: * * *
>
> (b) The taxes imposed by this section shall not apply in any year * * * to any insurance company subject to the tax imposed by section 243 or 246.
>
> SEC. 243. That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows: * * *
>
> SEC. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, col-

lected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows: * * *

SEC. 247. (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions: * * *

STATEMENT.

The facts were stipulated (R. 12-22; 46-56) and were found by the District Court as stipulated (R. 29). They are fairly presented in the opinion of the Circuit Court of Appeals (R. 65-72), and are merely summarized here.

The respondent was incorporated in 1906 under the Insurance Law of the State of New York as a title guaranty corporation. It was organized with the name Home Title Insurance Company of New York, which in 1921 was changed to Home Title Insurance Company. In its petition to change its name the respondent stated its objects as follows:

> That your petitioner corporation was duly incorporated under the Insurance Law of the State of New York and the objects for which it was formed are to examine and guarantee title to real estate, to lend money on real estate mortgages and to guarantee such mortgages as to payment of principal and interest and to do the work generally of a title insurance company.

(R. 12, Ex. A.)

Since the date of its organization the plaintiff has at all times been subject to examination by, and the supervision of, the Superintendent of Insurance of the State of New

York, and to all the provisions of the Insurance Law of that State applicable to title and credit guaranty corporations organized thereunder, and is, and has always been, required to file, and has filed annually, with the Superintendent of Insurance, on forms approved by him, the statements required by law. The plaintiff has always complied with the Insurance Law of the State of New York and the regulations of its Insurance Department, and has maintained a guaranty fund pursuant to the provisions of Article V of the Insurance Law. (R. 14, 21.)

The respondent's business has always consisted of its issuance of two kinds of contracts or policies, namely:

(a) Those in which it merely guarantees the title to real estate; and

(b) Those in which it guarantees (1) the title to the real estate covered by a mortgage and (2) the payment of the principal and interest of the bond and mortgage. (R. 17, 18, 48-54.)

When the respondent issued policies which merely guaranteed the titles to real estate, it also, as preliminary steps thereto, examined and prepared abstracts of titles, made searches, and procured information in relation thereto. For such policies the respondent received fixed charges, based on a scale dependent upon the amount of the policy, for (1) examination, (2) conveyancing, (3) recording, (4) survey, (5) tax search, and (6) taxes. (R. 17, 20, 48.)

When the respondent issued policies which guaranteed both the title and payment of the mortgage, it also, as necessary and incidental steps thereto, examined the title to the property involved, appraised the value of such property, and made all necessary inspections, examinations, etc. In connection with said policies the respondent re-

ceived (*a*) all fees and charges which it received in connection with the policies which merely guaranteed titles, that is, items (1) to (6) above; (*b*) a fee for inspection and appraisal of the property; and (*c*) an annual interest differential, known in the community as a "premium", which generally amounted to one-half of one per cent. of the face amount of the bond. (R. 17, 18; 20; 50.)

As classified for the purpose of the annual statements to the Superintendent of Insurance the respondent's income consisted of premiums for title insurance and mortgage guaranties; fees chiefly for examinations; interest; and sundry items; and the outgo of losses, commissions, salaries, rents, office expenses, taxes, and interest. (R. 15.) As reallocated for the purpose of distinguishing between title insurance and mortgage guaranties the respondent's total income for the five years 1921-1925 from premiums and fees was as follows:

(1) Mortgage guaranty premiums	$734,060.15
(2) Other mortgage guaranty fees	627,548.51
(3) Title insurance fees where no mortgage guaranty	2,532,927.00
(4) Title insurance fees where mortgage guaranty also	928,755.62
(5) Mortgage renewals	159,147.03
(6) Conveyancing fees	136,341.25
(7) Charges for searches	44,284.53
(8) Recording fees	29,520.24
(9) Charges for surveys	4,621.35

(R. 19, 20.)

The amount of (1) title insurance written by the respondent without guaranty of mortgages, and (2) the amount of mortgages guaranteed by the respondent, for each of the calendar years 1921 to 1925 were as follows:

Year	Title insurance	Mortgages guaranteed
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

The aggregate amount of title insurance written by the respondent, without guaranty of mortgages, outstanding during each of the years 1921 to 1925 was not less than $100,000,000. (R. 20, 21.)

The respondent has at no time had or sold any mortgages except those which it guaranteed, and its primary purpose in making loans has always been for the sale of the bonds and mortgages guaranteed as aforesaid. The respondent received no lending fees, and sold the mortgages at their face value. (R. 17-20.)

Guaranteed Mortgage Company and First Mortgage Guaranty Company, corporations incorporated under the Banking Law of the State of New York, have engaged in the business of making mortgage loans on real estate and selling mortgages, but only in part with their guaranty. The title to the property covered by such mortgages was insured by title insurance companies, corporations organized under the Banking Law not being entitled to insure titles to real estate. (R. 22; N. Y. Laws 1914, Chap. 369; Op. Atty. Gen. (1918), 15 N. Y. St. Dept. Rep. 551.)

The Lawyers Mortgage Company, the respondent in *Bowers* v. *Lawyers Mortgage Company*, No. 355, October Term, 1931, was engaged in guaranteeing mortgages, but none of its business consisted of title insurance. (*Bowers* v. *Lawyers Mortgage Company*; R. 9, 20, 57-63.)

Summary of Argument.

Section 1000 of the 1921 Act and Section 700 of the 1924 Act provide that the capital stock tax shall not apply to any insurance company subject to the tax imposed by Section 243 or 246. Section 243 imposes a tax upon the net income of every life insurance company and Section 246 imposes a tax upon the net income of every insurance company other than a life or mutual insurance company. The respondent is not a mutual insurance company. If then, the respondent is an insurance company of any other kind, it is not subject to the capital stock tax.

The respondent is an insurance company, and in particular a title insurance company, because

I. The respondent was organized and has always operated as an insurance company under the Insurance Law of the State of New York and could not issue any of its policies if not so organized and operated.

II. The fact that the State of New York recognizes and regulates the respondent as an insurance company and its business as insurance controls the respondent's classification as an insurance company.

III. The respondent derived most of its net income from title insurance.

A. The sums which the respondent received for guaranteeing titles and for services and disbursements necessary or incidental thereto were for insurance.

B. Most of the respondent's net income consisted of sums received by it for guaranteeing titles and for services and disbursements necessary or

incidental thereto, and its net income from the guaranty of mortgages was of minor importance.

C. The respondent derived no income from its loans on and sales of mortgages except as incidental to its guaranties.

IV. Substantially all of the respondent's income was subject to tax under Section 246 of the 1921 and 1924 Acts.

A. If the respondent's receipts from the guaranty of mortgages were from insurance, all of its income was subject to tax under Section 246.

B. Even if the respondent's receipts from the guaranty of mortgages were not from insurance, substantially all of its income would still be subject to tax under Section 246.

V. Section 246 of the 1921 and 1924 Acts is applicable to all insurance companies other than life or mutual insurance companies, whether or not all of their income is taxable thereunder.

A. The statutes do not define insurance companies taxable under Section 246, but include in its application every insurance company other than a life or mutual insurance company.

B. Insurance companies other than life or mutual insurance companies are taxable under Section 246 even though they receive income not taxable thereunder.

VI. The respondent's guaranty of the payment of mortgages constitutes insurance.

A. The respondent guarantees the payment of the debts of mortgagors and bears the risk of non-

collection from them, for which it receives a premium.

B. The respondent's guaranty of payment constitutes a contract of suretyship.

C. Because the respondent is a corporate surety for profit with respect to its guaranties of payment, such guaranties constitute insurance.

D. The respondent's guaranty of payment is a contract of indemnity in the sense in which indemnity is essential to a contract of insurance.

E. Congress has itself classified the guaranty of mortgages as insurance and has taxed mortgage guaranty policies as insurance policies.

Argument.

I.

The respondent was organized and has always operated as an insurance company under the Insurance Law of the State of New York and could not issue any of its policies if not so organized and operated.

Article V of the New York Insurance Law classifies title and credit guaranty corporations as insurance companies. A title and mortgage guaranty corporation, organized under Section 170 of Article V, may guarantee titles and the payment of bonds secured by mortgages. Such a corporation is subject to many limitations. (Insurance Law of New York, Appendix A hereto, pp. 47-51.)

The respondent's name is "Home Title Insurance Company". It was organized under Article V of the Insurance Law of the State of New York as a title and credit guaranty

corporation. The respondent, together with all of its business, has always been classified, regulated and supervised as an insurance company under said Insurance Law. (R. 12, 14, 21). The respondent has therefore been subject to the same restrictions as other insurance companies doing business in the State of New York. (*Trenton Potteries Co.* v. *Title Guarantee & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116, 117.)

It has been held that a corporation organized under the Business Corporations Law of New York cannot engage in the business of guaranteeing titles, because the power to engage in such business is expressly conferred upon corporations incorporated under the Insurance Law (Op. Atty. Gen. (1912), 345); that, upon the same principle, a credit guaranty company, the object of whose business is to guarantee the payment of commercial paper, bonds, notes and other instruments for the payment of money, cannot organize under the Business Corporations Law (Op. Atty. Gen. (1893), 308); and that a surety company incorporated under Section 70 of the Insurance Law is not authorized to insure a mortgagee against loss by reason of a defect of title in the mortgaged premises, because such insurance is exclusively within the province of title guaranty companies incorporated under Section 170 of the Insurance Law. (Op. Atty. Gen. (1918), 15 St. Dept. Rep. 551.) A corporation organized under the Banking Law may not guarantee titles. (Op. Atty. Gen. (1918), 15 N. Y. St. Dept. Rep. 551.)

Accordingly, the respondent's guaranty of titles would have been unlawful, and therefore impossible, if it had not been incorporated and regulated as an insurance company under the Insurance Law.

Every policy of mortgage guaranty issued by the respondent included its guaranty of the title to the real estate upon which the mortgage was placed. The issuance of such policies of mortgage guaranty would therefore have been unlawful if the respondent had not been incorporated and regulated as an insurance company under the Insurance Law.

Inasmuch as the respondent engaged in no business other than the writing of title and mortgage guaranty policies, it would have been unable to carry on any of its business if it had not been incorporated and regulated as an insurance company under the Insurance Law of New York.

II.

The fact that the State of New York recognizes and regulates the respondent as an insurance company and its business as insurance controls the respondent's classification as an insurance company.

Section 231 of the Revenue Act of 1918 exempted from the income tax "(4) Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit". Section 231 of the Revenue Act of 1921 exempted from the income tax "(4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and cooperative banks without capital stock organized and operated for mutual purposes and without profit". Except as above described, the revenue acts did not define building and loan associations.

In the case of *United States* v. *Cambridge Loan & Building Co.*, 278 U.S. 55, the question was the scope to give to the statutory words. It appeared that the Cambridge Loan & Building Company was incorporated under the laws of Ohio, by which it was recognized as a building and loan association, and that it conducted its business in accordance with the laws of that State. However, it received a large proportion of its deposits from persons who were not members and paid interest thereon, and it also made considerable loans to such persons. Also, even when the borrower was a stockholder, he was required only to subscribe for from one to five shares, regardless of the amount of the loan. The Government argued (1) that the Company was therefore a mere money-making institution like an ordinary bank; (2) that the State of Ohio gave it a false name; and (3) that the Company's classification under the laws of Ohio was not controlling.

We are not here concerned with the Government's argument (1). It is here immaterial whether the corporation was a building and loan association or a mere money-making institution. Arguments (2) and (3), however, are important in the present case, and this Court's answer thereto establishes the principle which we think should govern the present case. That answer (Mr. Justice Holmes writing) was as follows (p. 59):

> "The present taxes are upheld by the Government on the ground that the respondent is such a mask. It is argued that even admitting all that has been said thus far, a State cannot make a bank exempt merely by calling it a building and loan association. No doubt extravagant cases might be imagined. But these associations are well known and a State is not likely to be party to a scheme to

enable a private company to avoid federal taxation by giving it a false name. The statutes speak of 'domestic' associations, that is, associations sanctioned by the several States. They must be taken to accept, with the qualifications expressly stated, what the States are content to recognize, unless there is a gross misuse of the name. The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State."

III.

The respondent derived most of its net income from title insurance.

A. THE SUMS WHICH THE RESPONDENT RECEIVED FOR GUARANTEEING TITLES AND FOR SERVICES AND DISBURSEMENTS NECESSARY OR INCIDENTAL THERETO WERE FOR INSURANCE.

The petitioner concedes this (Brief 10). It concedes the correctness of the rulings of the Bureau of Internal Revenue in S. M. 5501, V-1 C. B. 102, and G. C. M. 5355, VII-2 C. B. 160.

In the first ruling a title guaranty corporation organized under the Insurance Law of the State of New York was held to be an insurance company within the meaning of Section 246 of the Revenue Act of 1924, although it appeared that of the total income of the corporation over 23 per cent. was attributable to interest, about 4 per cent. to appraisal and conveyancing fees, an unascertained part to searches, and the balance to title policies. The ruling stated in part as follows (V-1 C. B. 104):

"In view of all the foregoing, it is apparent that the income of the M Company is derived from the issuance of contracts of insurance and sources fairly incidental to what is an insurance business. It is true that a substantial part of the income of this company is derived from fees for searching and examining titles, not strictly insurance functions, yet it appears that these examinations are made solely as preliminary steps to the issuance of insurance contracts. This office is, therefore, of the opinion that a corporation so organized and operated is an insurance company within the meaning of section 246 of the Revenue Act of 1924 and entitled to file returns as an insurance company thereunder."

G. C. M. 5355, VII-2 C. B. 160, is in accord.

B. MOST OF THE RESPONDENT'S NET INCOME CONSISTED OF SUMS RECEIVED BY IT FOR GUARANTEEING TITLES AND FOR SERVICES AND DISBURSEMENTS NECESSARY OR INCIDENTAL THERETO, AND ITS NET INCOME FROM THE GUARANTY OF MORTGAGES WAS OF MINOR IMPORTANCE.

The respondent's gross income during the years in questions consisted of the following (R. 14, 15, 33):

Year	*Premiums, fees and charges*	*Interest and rent*	*Other income*
1921	$ 630,291.01	$ 69,565.22	$ 5,602.58
1922	925,596.83	103,194.57	29.37
1923	1,059,912.07	148,065.35	8,655.70
1924	1,160,895.92	191,173.88	18,752.93
1925	1,420,509.85	201,172.43	39,372.00

The premiums, fees and charges were received by the respondent in part for and in connection with (1) its issuance of policies which merely guaranteed the titles to real

estate, and (2) its issuance of policies which guaranteed both the title and payment of the mortgage (R. 17-18, 20, 48, 50-51). The petitioner apparently concedes (Brief 10) that if the respondent had not received the premiums, fees and charges for and in connection with its guaranty of mortgages, it would have been entitled to classification as an insurance company taxable under Section 246. An examination of these receipts (R. 19-20, 39), however, discloses that the greater part thereof is attributable to the respondent's guaranty of titles, and that the portion that is attributable to its guaranty of the payment of the mortgages is but a minor part of the respondent's entire income.

The stipulated facts show

1. That, as preliminary steps to its issuance of policies which merely guaranteed the titles to real estate, the respondent examined and prepared abstracts of titles, made searches and procured information thereto; and that in connection with each of said policies the respondent received fixed fees and charges, based on a scale dependent upon the amount of the policy, for (1) examination, (2) conveyancing, (3) recording, (4) survey, (5) tax search, and (6) taxes (R. 17, 20, 48); and

2. That, as necessary and incidental steps to its issuance of policies which guaranteed both the title and payment of the mortgage, the respondent examined the title to the property involved, appraised the value of such property, and made all necessary inspections, examinations, etc.; and that in connection with each of said policies the respondent received (*a*) all fees and charges which it received in connection with the policies which merely guaranteed titles, that is, items (1) to (6), inclusive, *supra*, (*b*) a fee for inspection and appraisal of the property, and (*c*) a premium

for its guaranty of the payment at maturity of the principal of the bond and a stated rate of interest (R. 17-18, 20, 50-51). In some instances the respondent received a fee for the renewal of mortgages, but the aggregate amount thereof is an insignificant part of the total fees received by the respondent (R. 15, 19, 33).

Accordingly, the premiums, fees and charges received by the respondent consist of nine separate items, namely, items (1) to (6), *supra*, which it received in connection with every policy issued by it; items (*b*) and (*c*), *supra*, which it received only when it issued policies which guaranteed both the title and payment of the mortgage; and fees for the renewal of mortgages. Said premiums, fees and charges for the years 1921 to 1925 consisted of the following (R. 19, 33):

	1921	1922	1923	1924	1925
(1) Mortgage guaranty premiums	$ 90,449.14	$ 105,750.03	$ 134,349.66	$ 175,641.39	$ 227,869.93
(2) Inspection and appraisal fees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Title insurance fees where no mortgage guaranty	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Title insurance fees where mortgage guaranty also	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees	3,316.28	4,094.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys	392.45	326.90	569.20	1,339.65	1,993.25
Total	$630,291.01	$ 925,596.83	$1,059,912.07	$1,160,895.92	$1,420,509.85
Other income	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	$705,458.81	$1,028,820.77	$1,216,633.12	$1,370,822.73	$1,661,054.28

Items (1), (5), (6), (7), (8) and (9), respectively, in the above table are the amounts received by the respondent, and shown separately in its books, during the years in question from each of six of the nine items aforesaid. The respondent's books also show the amounts actually received

by it, exclusive of said items, from fees and charges in connection with its policies which merely guaranteed the title to the real estate, as given in the above table as item (3). However, except as stated, the respondent's books did not segregate, as between the various items, the amounts received by it in connection with the policies which guaranteed both the title and payment of the mortgage. Of said amounts, the parts attributed in the table at page 19 of the record to the guaranty of the title and guaranty of payment of the mortgage, respectively, are shown in the above table as items (4) and (2), respectively. The amounts so attributed were arrived at by allocating 59.677 per cent. of the total to the guaranty of the title, and the balance to the guaranty of payment of the mortgage. (R. 19.) Said percentage of 59.677 was arrived at in the following manner:

The fees and charges which the respondent received during the years 1921 to 1925 in connection with each of its policies which merely guaranteed the titles, where the amount of the insurance was $5,000, amounted, in the aggregate, to $74. The fees and charges which the respondent received during said years in connection with each of its policies which guaranteed both the title and payment of the mortgage, where the amount of the loan was $5,000, consisted of said $74 and an additional charge of approximately $50 for inspection and appraisal of the property, or a total of $124. The ratio which said $74 is to said $124 is 0.59677. (R. 20.)

The respondent's allocation of the fees and charges received by it during the years 1921 to 1925 was made by its officers in the light of their intimate experience and familiarity with the business and is reasonable on the face of it. The allocation forms part of the stipulated facts, and the petitioner made no attempt to introduce evidence to dis-

pute it. There is nothing in the record which shows or purports to show that said allocation is in any way incorrect. (R. 20.)

Accordingly, of the premiums, fees and charges received by the respondent during the years 1921 to 1925, the amounts which it received for and in connection with its guaranty of titles (items (3), (4), (6), (7), (8), and (9) in the above table) and its guaranty of the payment of mortgages (items (1), (2) and (5) in the above table), respectively, are, in the aggregate, as follows:

Year	*Guaranty of titles*	*Guaranty of mortgages*
1921	$422,221.29	$208,069.72
1922	649,893.00	275,703.83
1923	779,345.80	280,566.27
1924	826,960.08	333,935.84
1925	998,029.82	422,480.03

The total gross income, outgo and net income of the respondent for the years in question were as follows (R. 15, 33-34.):

Year	*Income*	*Outgo*	*Net income*
1921	$ 705,458.81	$ 599,072.36	$106,386.45
1922	1,028,820.77	806,894.12	221,926.65
1923	1,216,633.12	1,156,101.34	60,531.78
1924	1,370,822.73	1,263,837.20	106,985.53
1925	1,661,054.28	1,361,294.17	299,760.11

From the above tables it may be calculated that the premiums, fees and charges received by the respondent in connection with its guaranty of the payment of mortgages constitute on the average 29.6 per cent. of its total premiums, fees and charges and 25.8 per cent. of its total gross income, respectively; and that the net income of the respondent averages 13.5 per cent. of its gross income.

An examination of the expenses of the respondent during the years in question (R. 15, 34) discloses that it was not practicable for it to segregate them on its books of account as between its guaranty of titles and of the payment of mortgages, respectively; and it made no such segregation. (R. 22.) However, the net income of the respondent averaged less than 14 per cent. of its gross income; and it is obvious, therefore, that, since the amounts which it received from its guaranty of the payment of mortgages averaged less than 26 per cent. of its entire gross income, said amounts are but a minor and incidental part of its net income. Moreover, the fees for inspections and appraisals, which amounted to almost as much as the interest differential premiums, and which we have attributed above to receipts from mortgage guaranties, might fairly be regarded as incidental to the title guaranties (see S. M. 5501, V-1 C. B. 102, *supra*), thus nearly halving the income strictly attributable to the mortgage guaranty operations. Clearly, by far the most of the respondent's net income was derived by it from its guaranty of titles and sources reasonably incidental thereto.

Of the aggregate amount of policies issued by the respondent during the years in question (R. 21), over 86 per cent. consisted of policies which merely guaranteed the titles to real estate. The aggregate amount of title policies, which did not guaranty mortgages, outstanding during each of the years in question was not less than $100,000,000. (R. 21.) The respondent has always been known as a title insurance company. (R. 12.)

Undoubtedly, therefore, the respondent's guaranty of titles was to it the most important factor in its mortgage guaranty policies.

C. THE RESPONDENT DERIVED NO INCOME FROM ITS LOANS ON AND SALES OF MORTGAGES EXCEPT AS INCIDENTAL TO ITS GUARANTIES.

For his reasons for contending that the decision of the Circuit Court of Appeals in the present case is erroneous the Solicitor General largely relies on his brief for the petitioner in the Lawyers Mortgage Company case. Aside from the consideration that the contention of the petitioner in the present case is accordingly based upon references to an entirely separate and dissimilar case, the arguments advanced by the Solicitor General in his brief in the Lawyers Mortgage Company case are irrelevant as applied to the respondent herein.

However, we understand his assertion to be, in effect, that the great bulk of the gross income of the Lawyers Mortgage Company was derived by it from loans on and sales of mortgages, and not from its guaranty of the mortgages; and that it was therefore engaged principally in an investment business (Brief in Lawyers Mortgage Company case 23, 24, 31, 35). At any rate, the facts in the present case with respect to the respondent are to the contrary. The respondent received no lending fees and sold its mortgages for the face amount of the loans it had made on them. (R. 17-20.)

"The successful conduct of the business of credit insurance necessarily depends upon the insurer receiving correct information from the insured as to his losses." (*Black Co.* v. *London Guarantee & Accident Co.*, 216 N. Y. 560, 563.) The respondent has at all times refused to guarantee any mortgage with respect to which it did not have full knowledge and over which it did not have complete control. (R. 17.) It made the loans on mortgages in order to secure such knowledge and control, and thus enable it successfully to

conduct its mortgage guaranty business. Also, as we have seen, every mortgage guaranty policy issued by the respondent included its guaranty of the title to the property, for which it received the major part of the fees and charges. It is clear that the respondent's loans on and sales of mortgages constituted feeders for its title insurance business.

The unanimous Circuit Court of Appeals stated the situation in the present case as follows (R. 70; 50 F. (2d) 107, 110):

> "In the case of one who trades in mortgages, the profit in the transaction is expected to come from the spread in purchase and sale prices. This is not true of the plaintiff's business. Its primary purpose in acquiring and disposing of mortgages is not to invest its funds or to sell the mortgages at a profit, but is to dispose of them at their face value accompanied by its guaranty; and it is from the 'premium' for such guaranty, together with the fees previously collected from the mortgagor upon the making of the bond and mortgage, that plaintiff's profit is derived. Such fees cover charges for searching the title, and for inspecting and appraising the property, etc. The fees for title examination may be considered as the premium for the guaranty of title contained in the policy that is subsequently to be issued upon plaintiff's disposal of the bond and mortgage. This is none the less title insurance because the word 'guarantee' rather than 'insure' is used. See Title Ins. & Trust Co. *v.* City of Los Angeles, 61 Cal. App. 232, 214 P. 667. Nor does it matter that the insurance is paid for by one who is not the insured. The fees for inspections, appraisals, etc., may be considered as an incident to the insurance of the mortgage, for it is not an unreasonable incident to the business of guaranteeing mortgages that the insured should investigate and appraise the property it is to insure."

IV.

Substantially all of the respondent's income was subject to tax under Section 246 of the 1921 and 1924 Acts.

A. IF THE RESPONDENT'S RECEIPTS FROM THE GUARANTY OF MORTGAGES WERE INCLUDED AS INSURANCE, ALL OF ITS INCOME WAS SUBJECT TO TAX UNDER SECTION 246.

As already noted, the petitioner concedes (Brief, 10) that if the respondent had not received the premiums and fees for its guaranty of mortgages it would have been taxable under Section 246 (S. M. 5501, V-1 C. B. 102). The petitioner also apparently concedes that in that event all of the respondent's gross income would have been subject to tax under Section 246 (Brief in Lawyers Mortgage Company case, 12-22). To the extent that the respondent's gross income from its mortgage guaranties constituted receipts for the guaranteeing of titles it was concededly taxable under Section 246 (S. M. 5501, V-1 C. B. 102). That leaves the receipts from the guaranty of payment of the mortgages as the only item concerning which there appears to be any question.

B. EVEN IF THE RESPONDENT'S RECEIPTS FROM THE GUARANTY OF MORTGAGES WERE NOT FROM INSURANCE, SUBSTANTIALLY ALL OF ITS INCOME WOULD STILL BE SUBJECT TO TAX UNDER SECTION 246.

The three items that might conceivably be excluded on such a basis are (1), (2) and (5) shown in the table at page 16 above (R. 19). In order to illustrate the result of such exclusion with as little complication as possible, there are set out below comparative figures of gross income from the

guaranty of titles and the guaranty of mortgages in the case of one year, 1922:

	Guaranty of Titles	*Guaranty of Mortgages*
(At page 19 of the record)		
(1) Interest differential	.....	$105,750.03
(2) Fees and charges for inspections and appraisals	.....	139,830.45
(3) Fees and charges where no guaranty of mortgages	$406,019.93	.....
(4) Fees and charges, exclusive of those for inspections and appraisals, where guaranty of payment of mortgages	206,945.45	.....
(5) Mortgage renewals	.....	30,123.35
(6)-(9) Conveyancing fees, etc.	36,927.62	.....
(At page 15 of the record)		
(10) Interest on loans, etc.	102,330.66	.....
(11) Rents	863.91	.....
(12) Sales of securities	29.37	.....
Total	$753,116.94	$275,703.83
Grand Total		$1,028,820.77

For 1922 items (1), (2) and (5) amount to $275,703.83 as against a total gross income for that year of $1,028,820.77. But item (2) consists of appraisal and inspection fees, which the petitioner seems to have recognized as incidental to title insurance (see last two paragraphs of Sol. Mem. 5501, V-1 C. B. 102), and which would be restored to gross income on that ground. And item (1), the excess of interest received over that paid on guaranteed mortgages, would certainly be claimed by the Treasury Department to be subject to tax as interest. Barely possibly, if item (5), mortgage renewals, were excluded from insur-

ance income, it might be treated as in the nature of gain on dealings in securities, which Section 246 does not profess to tax.

In short, although, as correctly held by the Circuit Court of Appeals, Section 246 was never intended to subject to tax all possible income of an insurance company, and the existence in the case of any particular company of income not subject to tax thereunder is no evidence that such company is not an insurance company within the meaning of Section 246, nevertheless, substantially all the gross income of the respondent was subject to tax under Section 246, irrespective of whether or not its guaranty of the payment of mortgages be regarded as insurance.

V.

Section 246 of the 1921 and 1924 Acts is applicable to all insurance companies other than life or mutual insurance companies, whether or not all of their income is taxable thereunder.

A. THE STATUTES DO NOT DEFINE INSURANCE COMPANIES TAXABLE UNDER SECTION 246, BUT INCLUDE IN ITS APPLICATION EVERY INSURANCE COMPANY OTHER THAN A LIFE OR MUTUAL INSURANCE COMPANY.

Section 1000 of the Revenue Act of 1921 (to which Section 700 of the Revenue Act of 1924 is similar) provides that the capital stock tax imposed by such section shall not apply to any insurance company subject to the tax imposed by Section 243 or 246 of the Revenue Act of 1921 (to which Sections 243 and 246 of the Revenue Act of 1924 are similar),

Section 243, together with Sections 244 and 245, of the Revenue Acts of 1921 and 1924 provides for the income tax on life insurance companies, and Section 246, together with Section 247, of the Revenue Acts of 1921 and 1924 provides for the income tax on insurance companies other than life or mutual insurance companies.

The effect of the provisions of the Revenue Acts of 1921 and 1924, above referred to, is to impose the capital stock tax on mutual insurance companies except mutual life insurance companies, and to exclude from the application of the capital stock tax life insurance companies, whether stock or mutual, and other insurance companies except mutual insurance companies. Section 1000 of the Revenue Act of 1921 and Section 700 of the Revenue Act of 1924 could not have stopped with the phrase "any insurance company", because in that event all mutual insurance companies would have been free from the capital stock tax, contrary to the intention of Congress. Obviously, the addition in those sections of the phrase, "subject to the tax imposed by Section 243 or 246", was to limit the exclusion from the capital stock tax to those kinds of insurance companies subject to tax under Sections 243 and 246, namely, life insurance companies and other insurance companies except mutual insurance companies.

Section 242 defines a life insurance company, but there is no definition of other insurance companies.

Section 246 imposes a tax upon the net income of "every insurance company" other than a life or mutual insurance company. There is nothing in the statute indicating a purpose to confine its operation to any particular subjects of insurance. On the contrary, it was framed in general and comprehensive terms that cover insurance of every kind and character. The statute must, therefore, be construed

to include all insurance companies other than life and mutual insurance companies. *Cf. Lumber Mutual Fire Insurance Co.* v. *Malley,* 44 Fed. (2d) 553; *Northwestern Mutual Life Ins. Co.* v. *Roberts,* 177 Cal. 540, 171 Pac. 313, 314.

B. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL INSURANCE COMPANIES ARE TAXABLE UNDER SECTION 246 EVEN THOUGH THEY RECEIVE INCOME NOT TAXABLE THEREUNDER.

The Solicitor General concedes that Section 246 "does not include many kinds of income which were to be included in the gross income" of insurance companies under the Revenue Act of 1918 and "other corporations" under the Revenue Acts of 1921 and 1924, but asserts that "apparently" there was no design to exempt any insurance company from taxation on any of its income, and that Section 246 therefore applies only to insurance companies all of whose income consists of premium income and investment income taxable thereunder. (Brief in Lawyers Mortgage Company case, 13-15.) Of course, the revenue acts do not so provide. To say that this assumption may be implied from Sections 246 and 247 is tantamount to saying that those sections impose a tax upon all of the income of insurance companies which come within their purview. This is clearly contrary to the intention of Congress and to the decided cases.

The Solicitor General concedes that insurance companies taxable under Section 246 were not required to include capital gains. The statute itself makes no distinction whatsoever between such gains and any other of the aforesaid "many kinds of income" which Section 246 concededly does not include, and the Solicitor General does not contend otherwise. "We understand", he says, "that the

reason why sales of capital assets were not to be included in computing the income tax was that there was a falling market at the time when this matter was considered and it was believed that insurance companies would take losses for tax purposes if sales of capital assets were included." (Brief in Lawyers Mortgage Company case, 15.)

The Solicitor General does not explain, however, why, if the market was falling, Congress did not also exempt corporations generally and individuals from taxation on capital gains in order to stop them from taking losses for tax purposes. Of course, if Congress desired to stop insurance companies or other taxpayers from taking capital losses it needed only to exclude such losses from the deductions allowed taxpayers. This it did not do. The exemption of income from taxation is scarcely equivalent to the denial of the deduction of losses.

No change was made in the law in regard to this matter until the Revenue Act of 1928 (Ch. 852, 45 Stat. 791) Section 204 (b) (1) (B) of which provides for the taxation of capital gains of insurance companies. Congress was apparently impelled to change the law in the 1928 Act by reason of its desire to eliminate the inequality which had existed between insurance companies under Section 246 and mutual insurance companies, which were always taxable on capital gains (*Alliance Ins. Co. of Philadelphia* v. *MacLaughlin*, 49 Fed. (2d) 361, 362).

(1) *The legislative history of these sections demonstrates conclusively that Congress selected the premium income and investment income as items of taxation solely for the purpose of providing a simple, certain and equitable method of computing the tax upon insurance companies, and that it intended that all other income be free from the tax.*

Ever since the Corporation Tax Act of August 5, 1909, the United States has laid a tax on insurance companies measured by net income. Prior to the Revenue Act of 1921, however, insurance companies were included in the statutory provisions imposing the income tax on corporations generally, and the gross and net incomes of insurance companies were, with stated exceptions, determined as in the case of other corporations. (See Sections 1, 230 (a), 232 and 233 (a), Revenue Act of 1918 (Ch. 18, 40 Stat. 1057); Section 1206, Revenue Act of 1917 (40 Stat. 300); Sections 10 and 12, Revenue Act of 1916 (Ch. 463, 39 Stat. 576); Section G, Revenue Act of 1913 (38 Stat. 114, 166); and Section 38, Revenue Act of 1909 (36 Stat. 112).)

Accordingly, before the 1921 Act, Congress sought to measure the tax upon insurance companies upon the same basis as other corporations, that is, by using the income derived by them from all sources. The regulations of the Treasury Department therefore provided that the gross income of insurance companies "consists of their total revenue from the operation of the business and of their income from all sources within the taxable year, except as otherwise provided by the statute". (Regulations 45, Article 548. See also Regulations 33 (Rev.), Paragraphs 673 and 674.) Because gross income was so defined, these regulations provided that there should be included in gross income, among other items, net premiums (that is, gross premiums less returned premiums on policies cancelled and premiums on policies not taken), investment income, profits from the sale of assets, and all gains, profits, and income reported to the State insurance departments, except income specifically exempt from tax.

In 1918 life insurance companies complained that the mixing of insurance with every other line of business in the revenue acts, and the attempt to tax them upon their income

from all sources, had resulted in chaos, and imposed upon them an uncertain and inequitable burden, and proposed that life insurance be given a separate classification and title and be taxed under a special simple provision, which would eliminate uncertainty, expensive bookkeeping and costly supervision. (See Hearings before the Committee on Ways and Means, House of Representatives, 65th Cong., 2d Sess., on the proposed Revenue Act of 1918, Pt. I, pp. 791-843.) The relevant part of a memorandum then submitted to the Ways and Means Committee on behalf of 111 life insurance companies is given in Appendix B to this brief, pages 52-58, *infra*. The Senate Finance Committee recommended in 1918 the plan later included in the Act of 1921 (Senate Report, 65th Cong., 3rd Sess., No. 617, p. 9). The plan was adopted by the Senate in the 1918 bill, but had to be abandoned in conference. (Conference Report, 65th Cong., 3rd Sess., Rep. No. 1037, p. 60).

At the annual meeting of Life Insurance Presidents, December, 1920, it was stated that the basis of the income tax was unsatisfactory both to the companies and the Government, and that a plan similar to that embodied in the Senate amendment to the 1918 bill should be adopted. (Proceedings of the Fourteenth Annual Meeting, pp. 140, 141, 143-145.) A statement on behalf of the Association of Life Insurance Presidents made to the Committee on Finance of the Senate, in its hearings on the proposed Revenue Act of 1921, a part of which is given in Appendix B to this brief, pages 58 and 59, *infra*, protested that the income tax imposed upon insurance companies by the prior revenue act was "unscientifically imposed", "unduly burdensome in many respects", and "unequal and unequitable as between companies", and, referring to the plan adopted by the Senate in 1918, said:

> "The law proposed then, to which we assented, would have increased our taxes, but it would have made them definite and certain from our standpoint and from the standpoint of the Government. It would have saved much of the litigation in which we have had to engage. There are now literally millions of dollars in litigation under the ambiguities and uncertainties of the present law, and the life companies are very anxious to be rid of that situation."

The Revenue Bill of 1921 (42 Stat. 227), as introduced in the House, contained the plan of taxation of life insurance companies which had been adopted by the Senate in 1918. (House Report, 67th Cong., 1st Sess., No. 350, p. 14.) The Revenue Bill of 1921 as passed by the House apparently for the first time made the new system of taxing life insurance companies also applicable to other kinds of insurance companies. The Senate, by amendment, made the scheme applicable only to life insurance companies, and by another amendment provided a different method of taxing other insurance companies, to which the House agreed in conference, as shown in Appendix B hereto. (House Report, 67th Cong., 1st Sess., No. 486, pp. 39-41.)

Mr. Smoot, Chairman of the Senate Finance Committee, reported said amendments. In the debate thereon in the Senate on October 29, 1921, when it was proposed to repeal the then existing tax on insurance premiums before enacting the new plan of taxing insurance companies, the following colloquy occurred (Cong. Record, 67th Congress, 1st Sess., Vol. 61, pp. 6982-6983):

> "Mr. Reed. I ask the Senator from Utah briefly to explain to the Senate the purpose of the amendment.
>
> Mr. Smoot. Under title 5 of the bill, the taxes on premiums on insurance companies are abolished en-

tirely. If this provision which we ask to have stricken out is agreed to, all insurance companies will be put on one basis and under one form of taxation, and that is the object of this amendment.

* * * * * *

Mr. Reed. Mr. President, I put the question to the Senator from Utah in all fairness, whether we ought to strike out the present substantive law until we know what is proposed to be substituted for it, and whether we should not adopt the new matter before we strike out the existing law? I would be entirely in the dark. I may be quite agreeable to all these changes; but I do not know what it is proposed to substitute.

Mr. Smoot. I want to say to the Senator, briefly, that the insurance companies of the United States have felt that the existing law is rather cumbersome and in some cases unfair. They are not asking for any decrease in the amount of tax to be collected. In fact, the plan which has been agreed upon will raise more revenue than the existing law; but it simplifies it, and all companies are treated alike. All the companies in the United States, as far as I know, have agreed to the new form of taxation."

It is accordingly clear that the difficulty which Congress was trying to remedy had nothing to do with any definition of insurance companies. The problem which confronted Congress was to devise a method of computing the income tax of insurance companies which would be simple, certain and equitable to them, and yet yield a fair revenue to the Government. And in Sections 246 and 247 it merely attempted to solve that problem.

In drafting these sections Congress was certainly aware that insurance companies might receive income from other sources than interest, dividends, rents and premiums; it

had taxed such other income in the preceding revenue acts. There was no controversy or litigation over the definition of insurance companies. There was merely the request that Congress select a simple and certain part of the income of insurance companies for taxation in order to eliminate the confusion, uncertainty and injustice of the preceding revenue acts. And that is all that Congress did.

(2) *The underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, referred to in Section 246, does not define or restrict the income of insurance companies taxable under Sections 246 and 247.*

It should be observed that, while Section 246 refers to the form of annual statement approved by the National Convention of Insurance Commissioners, it proceeds to specify, regardless of such annual statement, just what shall be included in gross and net income. No special form of annual statement for title insurance companies was prepared or approved by the Insurance Commissioners until long after the taxable years in question. Title insurance companies, nevertheless, have always been held to constitute insurance companies within the provisions of Sections 246 and 247 and have always been taxed accordingly (Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355, VII-2 C. B. 160).

In *Massachusetts Protective Ass'n, Inc.* v. *Commissioner*, 18 B. T. A. 810, the Board of Tax Appeals approved the inclusion by the Commissioner of Internal Revenue in the taxable income for 1922 of an accident and health insurance company, concededly taxable under Section 246 of the Revenue Act of 1921, of certain policy fees which were not included in the underwriting and investment exhibit of the

Insurance Commissioner's statement. The Board said in part:

> "The provision of the statute that the gross income be computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners does not intend to restrict gross income to the actual setup appearing in the statement, but rather contemplates the use of the statement as a guide and the acceptance of the figures and statements therein contained as correct, unless proven to be in error."

In *Western Casualty Co.* v. *Commissioner,* 20 B. T. A. 738, the Board of Tax Appeals approved the action of the Commissioner of Internal Revenue in denying a health and accident insurance company, concededly taxable under Sections 246 and 247 of the Revenue Act of 1926, which are substantially the same as Sections 246 and 247 of the Revenue Acts of 1921 and 1924, the right to deduct a certain reserve from its taxable income for 1926 because that item was not allowed as a deduction by Section 247, although it was shown as an expense on the annual statement approved by the National Convention of Insurance Commissioners.

Moreover, the National Convention has approved forms for "miscellaneous insurance companies," and title and mortgage guaranty companies could fall within this classification.

(3) *In the cases wherein the question has been raised, insurance companies have been held both taxable under Sections 246 and 247 and free from tax on some of their respective incomes.*

In *John Hancock Mutual Life Ins. Co.* v. *Commissioner of Internal Revenue,* 10 B. T. A. 736, capital gains were

held not to be taxable to a life insurance company because in the case of such a company "gross income" means the gross amount of income received from interest, dividends, and rents, and therefore nothing else.

In *Independent Life Insurance Co.* v. *Commissioner of Internal Revenue,* 17 B. T. A. 757, the Board of Tax Appeals held that under the Revenue Acts of 1921 and 1924 life insurance companies could not be taxed on premium receipts even indirectly. Referring to the Commissioner of Internal Revenue, the Board said:

> "*Respondent suggests, however, that since Congress has not measured the tax by using all of petitioner's income, such as premium receipts or sales profits, as it might have done,* petitioner could only complain by showing that the tax now determined for assessment is greater in amount than it would have been if Congress had used its power to the full extent. . . . By defining statutory gross income to include only interest, dividends, and rents, the intention was disclosed to omit all other factors from consideration. *National Life Insurance Co.* v. *United States, supra.* The effect otherwise would be to include premium receipts in gross income to the uncertain extent necessary to make up in each case for items improperly included, such as interest from State securities, or capital property like stock dividends, and thus to defeat the manifest legislative purpose to leave premium receipts entirely out of the income taxed. Thus to Congress would be ascribed the recondite purpose of ostensibly releasing premiums from tax while actually requiring them to be used to validate particular taxes which would otherwise invade constitutional rights. We reject this and treat the statute as candidly expressing its design and purpose." (Italics ours.)

Accordingly, it is clear that in the case of life insurance companies, taxable under Sections 244 and 245, the statutory definition of gross income concededly does not include, and was not intended to include, all of their regular or other income. This is equally true of insurance companies taxable under Section 246.

In *Massachusetts Protective Ass'n, Inc.* v. *Commissioner of Internal Revenue,* 18 B. T. A. 810, *supra,* it also appeared that the petitioner, an accident and health insurance company, concededly taxable under Section 246 of the Revenue Act of 1921, in 1922 received $125,000 in settlement of a suit brought by it against the National Protective Association and its officers to recover for the latter's alleged wrongful acts in competing with the petitioner. The Board held that such amount was not taxable and, referring to Section 246, said

> "The statute makes no provision for the inclusion in gross income of such an amount, and in determining the petitioner's taxable income we cannot go outside of the statute. *It was well within the rights of Congress to say what part of their gains the petitioner and other like insurance companies should be taxed upon, or from what sources their taxable income should be derived. It has said that only the earnings from investments and the earnings from premiums on insurance contracts should be taxed. We may presume that Congress was aware in drafting the law that a taxpayer, such as the petitioner, might receive income, in the general sense of the term, from other sources than those named.*" (Italics ours.)

The Treasury Department, unwarrantably narrow as its practice is, has never adopted the extreme position which

the Solicitor General finds it necessary to take in the present case. Not only has the Government consistently held that title guaranty corporations are taxable as insurance companies under Section 246, but it has expressly recognized that such classification is not voided for their receipt of incidental income from sources regarded as other than insurance. See Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355, VII-2 C. B. 160.

The Solicitor General asserts (Brief in Lawyers Mortgage Company case 16-17) that the provisions of Section 246 allowing a division of premiums into earned and unearned premiums are not applicable to the premiums received by the Lawyers Mortgage Company for its guaranty of the payment of mortgages, and that Section 246 does not, therefore, apply to that Company. This argument, however, proves too much; for concededly, said provisions of Section 246 are not adapted to companies engaged solely in insuring titles (I. T. 1981, III-1 C. B. 311), which would therefore be excluded, although such companies are admittedly taxable under Section 246 (Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355, VII-2 C. B. 160).

The Solicitor General also asserts (Brief in Lawyers Mortgage Company case 18-20) that affirmance of the decision below in the Lawyers Mortgage Company case would permit many companies to escape taxation on a substantial part of their income. However that may be in that case, it certainly is not true in the present case (pp. 22-24, *supra*). As we have seen (pp. 14-19, *supra*), most of the respondent's income was derived from its guaranty of titles. Because the respondent's guaranteeing of the payment of mortgages constitutes insurance, the income therefrom is also taxable. Moreover, even if any of the incidental income of the respondent would escape taxation, it does not follow,

for the reasons hereinbefore stated, that the respondent is not an insurance company under Section 246.

The sole question involved in *Mortgage Guarantee Co. v. Welch*, 38 Fed (2d) 184, was whether certain mortgage participation certificates constituted "corporate securities" and were, therefore, subject to the stamp tax imposed by Section 800 of the Revenue Act of 1926, 44 Stat. 99, and Section 422 (a) of the Revenue Act of 1928, 44 Stat. 867. The court held that said certificates constituted corporate securities and were, therefore, subject to the stamp tax. The question whether said certificates constituted contracts of insurance was not an issue in the case, was not considered, and could have no bearing on the case. The representation by the Solicitor General (Brief in Lawyers Mortgage Company case 20) that the decision in the present case "may well have an important bearing" on cases involving said stamp tax, is, therefore, wide of the mark.

VI.

The respondent's guaranty of the payment of mortgages constitutes insurance.

In support of his contention to the contrary the Solicitor General merely refers to his brief for the petitioner in the entirely separate and dissimilar Lawyers Mortgage Company case. The Circuit Court of Appeals unanimously held that the respondent's business of guaranteeing the payment of mortgages was truly insurance. (R. 69.)

The Solicitor General's assertions are, as we understand them, that the guaranty of payment of the mortgages by the Lawyers Mortgage Company was but an incident to its making of the loans on and sales of the mortgages, from

which it derived much of its income; that the Company received no compensation for its guaranty of payment; and that the holders of the mortgage guaranty policies were merely investors who bought only the obligation of the Lawyers Mortgage Company, and were not, therefore, insured against any risk. (Brief in Lawyers Mortgage Company case 22-35.)

In the present case, as we have seen, the respondent derived no income from its loans on and sales of mortgages, which were merely incidental to its guaranty business; and the premiums paid to the respondent constituted compensation for its guaranty of the payment of the mortgages. (R. 18.)

A. THE RESPONDENT GUARANTEES THE PAYMENT OF THE DEBTS OF MORTGAGORS AND BEARS THE RISK OF NONCOLLECTION FROM THEM, FOR WHICH IT RECEIVES A PREMIUM.

The non-payment of a bond or the non-performance of any of the provisions of a mortgage without question is a breach of a contract or undertaking the performance of which can be guaranteed; and in such a case the guarantor takes upon himself certain risks to which the obligee or creditor would otherwise be exposed. (*People* v. *Potts*, 264 Ill. 522, 106 N. E. 524; *Hunt* v. *New Hampshire Fire Underwriters Ass'n.*, 68 N. H. 305, 38 Atl. 145, 147.) We agree with the Solicitor General that the respondent's obligation on its guaranty of payment of mortgages is closely analogous to the obligation of a factor under a *del credere* commission.

In both cases the relation between the guarantor and the creditor is that of principal and agent; the respondent is appointed agent to collect the interest and principal of the bond and mortgage (R. 51-54); and the factor is appointed agent to sell the merchandise and perform such

other services as the given contract may provide. Even if the respondent's agency is irrevocable, the relationship between it and the policyholder is none the less that of principal and agent (*Barney* v. *Bond & Mortgage Guarantee Co.*, 118 Misc. (N. Y.) 241, 193 N. Y. Supp. 19). As agents, both the respondent and the factor engage only for reasonable skill and ordinary diligence, and are liable only for injuries to their respective principals growing out of want of that skill and diligence (*Loeb* v. *Hellman*, 83 N. Y. 601, 602-603); but are liable as fiduciaries, and not as debtors, for the proceeds of the mortgages and sales, respectively, collected by them (*Wallace* v. *Castle*, 14 Hun 106; *Gindre* v. *Kean*, 7 Misc. 582, 28 N. Y. Supp. 4, 5).

Again, both the respondent and the factor under a *del credere* commission, in consideration of an additional compensation, absolutely engage to pay to their respective principals the amount of the mortgage and the price of the goods sold, respectively, when the term of credit has expired, thus relieving the principal of all risk of loss in case the debtors fail to pay. Although this guaranty of payment enlarges the duty of the respondent and the factor beyond that required of them by law as agents, it does not otherwise alter the agency, and they still remain liable as fiduciaries, and not as debtors, for the amounts collected by them. Notwithstanding said guaranty of payment, the mortgagor and purchaser, respectively, continue to be primary debtors (*Miller* v. *Reinhart*, 119 N. Y. 368, 378-379), and the principals are not confined to suit on the guaranty, but can also pursue their remedies against said debtors while the moneys are unpaid by them, and against the respondent and factor, respectively, for the moneys paid to them. (*Gindre* v. *Kean*, 7 Misc. 582, 28 N. Y. Supp. 4, 5; *Gans* v. *McGowan*, 41 App. Div. 461; *Loos* v. *McCor-*

mack, 107 App. Div. 8, 10; *State* v. *McAvoy*, 40 R. I. 437, 450-452, 101 Atl. 109.)

Accordingly, as the Circuit Court of Appeals held, the respondent bears the risk of non-collection from the mortgagors.

B. THE RESPONDENT'S GUARANTY OF PAYMENT CONSTITUTES A CONTRACT OF SURETYSHIP.

Technical differences found by some courts between contracts of "guaranty", "suretyship" and "indemnity" obviously are not decisive on the question here under consideration as to whether the respondent's business of bearing said risks constitutes insurance. The nature of the obligation, and not the use of such terms as "guaranty", "suretyship" or "indemnity", determines the legal effect of the contract. (*Dayton Rubber Mfg. Co. of Delaware* v. *Sabra* (C. C. A.), 31 Fed. (2d) 9; *Pan-American Bank & Trust Co.* v. *National City Bank*, 6 Fed. (2d) 762, certiorari denied 269 U. S. 554.) In *Allin* v. *Motorist's Alliance of America*, 234 Ky. 714, 29 S. W. (2d) 19, a contract was held to be one of insurance even though it expressly stated, on its face, that it was not an insurance policy. Although the question under consideration is one of general law, yet, under well-settled principles, it should, if possible, be decided in harmony with the decisions of the New York courts. (*B. F. Sturtevant Co.* v. *Fidelity & Deposit Co. of Maryland*, 285 Fed. 367; *Ramsey & Gatlin Construction Co., et al.* v. *Vincennes Bridge Co.*, 283 U. S. 796; *Community Bldg. Co.* v. *Maryland Casualty Co.* (C. C. A.), 8 Fed. (2d) 678.)

The confusion of the Solicitor General is in part based upon his erroneous notion that a guaranty is in some way

different from a contract of suretyship. Such a notion was unknown to the common law and is unknown to the English courts. It is found only in some American cases and arose in the Pennsylvania case of *Gibbs* v. *Cannon* (1823), 9 Searg. & Rawle (Pa.) 198, 201, and the Massachusetts case of *Oxford Bank* v. *Haynes* (1825), 25 Mass. (8 Pick.) 423, 428, where the courts were not, in fact, interpreting the word "guaranty". See the learned and exhaustive article on Guaranty and Suretyship by Max Radin in 17 California Law Review 605-662, concluded in 18 California Law Review 21-30. As Mr. Radin aptly concludes (18 *id.* 30):

> "It is in the highest degree unfortunate that the decision of any case should be allowed to turn upon the whimsy of a Pennsylvania or Massachusetts judge of nearly a century ago. It has no roots in the past. It has no sense in the present. If it is disregarded—as it is in many jurisdictions—it will clear the subject of a portentous amount of confused phrases and economize effort in investigating, besides avoiding the obvious injustice of refusing or granting relief on so insubstantial a basis."

In New York and the courts of the United States, as in England, the alleged distinction never gained a footing. *Cumpston* v. *McNair* (1828), 1 Wend. (N. Y.) 457; *Davis* v. *Wells* (1881), 104 U. S. 159 (where the court states that the "contract of guaranty is the obligation of a surety").

The liability of a surety is original, primary and direct, and a contract imposing such liability is one of suretyship. (*Transcontinental Petroleum Co.* v. *Interocean Oil Co.*, 262 Fed. 278, 283; *Peterson* v. *Miller Rubber Co. of New York* (C. C. A.), 24 Fed. (2d) 59, 61.) Where, because of the nature of the obligation, a guaranty constitutes such a lia-

bility, the contract is one of suretyship, without regard to whether it is called one of guaranty or suretyship. (*Dayton Rubber Mfg. Co. of Delaware* v. *Sabra* (C. C. A.), 31 Fed. (2d) 9.)

In New York and the courts of the United States the respondent's guaranty of payment constitutes an absolute, original, primary and direct promise by it to pay the bonds, both principal and interest, at the times the payments are promised in the bonds, and is a contract of suretyship. *Wayne Oil Tank & Pump Co.* v. *Stoltz,* 163 N. Y. Supp. 601; *First Nat. Bank* v. *Jones,* 219 N. Y. 312; *Loos* v. *McCormack,* 107 App. Div. 8, 93 N. Y. Supp. 1088; *In re Adair Realty & Trust Co.,* 35 Fed. (2d) 531.

C. BECAUSE THE RESPONDENT IS A CORPORATE SURETY FOR PROFIT WITH RESPECT TO ITS GUARANTIES OF PAYMENT, SUCH GUARANTIES CONSTITUTE INSURANCE.

The respondent's guaranty of payment is for a profit, which is a part of its business. That business is the same as credit and fidelity insurance as practiced by corporate sureties for profit, and is truly insurance. As the Circuit Court of Appeals said in the present case (R. 69, 50 Fed. (2d) 110):

> "There is no hard and fast line between contracts of insurance and contracts of guaranty. Frost, Law of Guaranty Insurance (2d Ed.) 16; Hunt *v.* New Hampshire Fire Underwriters' Ass'n, 68 N. H. 305, 308, 38 A. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602. Insurance differs from guaranty only as the business of insurance differs from a single contract of guaranty, suretyship, or indemnity. The business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer

to accept each risk at a slight fraction of the possible liability upon it. As this court said in Tebbets *v.* Mercantile Credit Guarantee Co., 73 F. 95, at page 97, in respect to credit insurance: 'Corporations entering into contracts like the one at bar may call themselves "guarantee" or "surety" companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such.'"

The following cases are in accord:

Young v. *American Bonding Co.*, 228 Pa. 373, 77 Atl. 623; *State* v. *Chicago Bonding & Surety Co.*, 279 Mo. 535, 215 S. W. 20, 25; *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246; *Town of Whitestown* v. *Title Guaranty & Sur. Co.*, 72 Misc. Rep. 498, 131 N. Y. Supp. 390, 393 (aff. 148 App. Div. 900, which was aff. 209 N. Y. 12); *Tidewater Coal Exchange, Inc.*, v. *New Amsterdam Casualty Co.*, 20 Fed. (2d) 951; *People* v. *Potts*, 264 Ill. 522, 106 N. E. 524.

The cases involving factors under *del credere* commissions cited by the Solicitor General (Brief in Lawyers Mortgage Company case 31), presented no occasion for deciding whether the factors' guaranty of payment constituted insurance. We know of no *del credere* cases where there was need for such a decision, and the Solicitor General cites no such cases. The cases cited on pages 64 to 67 of the petitioner's brief in the Lawyers Mortgage Company case are clearly distinguishable and do not apply to the situation in the present case.

D. THE RESPONDENT'S GUARANTY OF PAYMENT IS A CONTRACT OF INDEMNITY IN THE SENSE IN WHICH INDEMNITY IS ESSENTIAL TO A CONTRACT OF INSURANCE.

The point as to indemnity which the Solicitor General makes (Brief in Lawyers Mortgage Company case 28-30) has been fully answered by the Circuit Court of Appeals in the present case, as follows (R. 68-69):

> "The argument runs that a guaranty, i. e., the promise to pay the debt of another, can not be insurance, because it is not a contract of indemnity. Speaking generally, it may be said that a contract of insurance is a contract of indemnity, and many authorities might be cited containing statements to this effect. See United States *v.* Supplee-Biddle Hardware Co., 265 U. S. 189, 195, 44 S. Ct. 546, 68 L. Ed. 970; Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 502, 43 N. E. 293, 52 Am. St. Rep. 528; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 31, 54 Am. Dec. 309. The statement is true if it means that the insured must have some interest at risk, for otherwise the contract is a wager; but it is not true if construed to mean that the insured can never collect from the insurer more than his actual loss (Empire Development Co. *v.* Title Guarantee & Trust Co., 225 N. Y. 53, 58, 121 N. E. 468), or that the insured must first salvage what he can and then look to the insurer only for the difference. As is well known, it is the common practice of fire and marine insurers to pay in full and take over the physical remnants of the insured property in the event of injury sufficient to constitute a 'total loss.' They do not indemnify the insured in the sense required by the defendant's argument; rather they pay upon the happening of the condition specified in the policy, and themselves work out the salvage. Similarly, a policy of credit insurance would surely be no less insurance because the contract provided that upon

the debtor's default the insurer would pay in full and take over the claim for collection. See Dane *v.* Mortgage Ins. Co. 1894), 1 Q. B. 54; Shaw *v.* Royce (1911), 1 Ch. 138. This is in substance what the plaintiff agrees to do in its policies of mortgage guaranty. If the mortgagor pays, the plaintiff will remit as soon as collected, reserving its 'premium' from the interest, but in any event it will pay on the date specified in its 'policy.' It bears the risk of noncollection from the mortgagor."

E. CONGRESS HAS ITSELF CLASSIFIED THE GUARANTY OF MORTGAGES AS INSURANCE, AND HAS TAXED MORTGAGE GUARANTY POLICIES AS INSURANCE POLICIES.

Title V of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057) imposed certain taxes on "insurance". Section 503 of that title imposed a tax "on the issuance of insurance policies", including

> "(c) Casualty insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or obligation of the nature of indemnity for loss, damage, or liability (except bonds and policies taxable under subdivision 2 of schedule A of Title XI) * * * "

Schedule A of Title XI of the Revenue Act of 1918 imposed stamp taxes on various items, including

> "2. Bonds, indemnity and surety: On all bonds executed for indemnifying any person who shall have become bound or engaged as surety, and on all bonds executed for the due execution or performance of any contract, obligation, or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies, * * * 50 cents: *Provided,* That

where a premium is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged: * * *"

Accordingly, Congress classified the bonds and policies taxable under subdivision 2 of schedule A of Title XI as "insurance"; it regarded policies guaranteeing titles to real estate and mortgage guarantee policies as of the same character; and it classified and taxed them as "policies of insurance" under said subdivision 2.

CONCLUSION.

For the reasons above set forth the respondent, as an insurance company, is not subject to the capital stock taxes imposed by the Revenue Acts of 1921 and 1924. It is an insurance company under the laws of the State of its incorporation; its business is regulated as insurance; it derives most of its income from title insurance; substantially all of its income is subject to tax under Section 246, which is applicable to all insurance companies, whether or not all of their income is taxable thereunder; and, finally, the guaranty of mortgages, a phase of the respondent's business subsidiary to title insurance, also constitutes insurance. The judgment of the Circuit Court of Appeals should accordingly be affirmed.

January 14, 1932.

Respectfully submitted,

SATTERLEE & SPENCE,
Attorneys for the respondent.

HUGH SATTERLEE,
I. HERMAN SHER,
Of counsel.

Appendix A.

Insurance Law of New York.

The statutory provisions which were in force and under which the respondent was organized on February 8, 1906, were in part as follows:

THE INSURANCE LAW (Being Chapter 38 of the General Laws).

ARTICLE V.

Title and Credit Guaranty Corporations.

Incorporation of title and credit guaranty corporations. Five or more persons may form a corporation for either one or the other of the following purposes:

1. To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, guarantee or insure the payment of bonds and mortgages and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon which shall be known as a title guarantee corporation; * * * (L. 1892, ch. 690, §170, as am'd L. 1900, ch. 266; L. 1901, ch. 677, and L. 1904, ch. 543; vol. 4, p. 432, of Supp. to Birdsey's R. S., 3d ed.)

Investment of capital and funds of a title guaranty corporation. The capital and funds accumulated in the course of its business of every such title guaranty corporation shall be invested in the same kind of securities as the capital and stock of insurance corporations are required by this chapter to be invested. Every such corporation shall set apart a sum not less than two-thirds of the amount of its capital stock as a guaranty fund, and shall invest the same in the kinds of securities in which it is permitted to invest

its capital. No such corporation shall issue any guaranty or policy of insurance upon bonds and mortgages or to owners of real property and others interested therein against loss by reason of defective titles and other incumbrances, until such sum has been so set apart and invested. Such fund shall be kept and applied for the security and payment of losses and expenses which may be incurred by reason of the guaranty or insurance made as aforesaid, and shall not be subject to other liabilities of the corporation to the extent of and so long as any such guaranty or insurance is outstanding. If an increase of its capital stock is made by any such corporation, two-thirds of such increase shall be set apart and added to the guaranty fund thereof and kept and invested as above provided. When, on account of losses or otherwise, the amount of the guaranty fund of any such corporation shall fall below such sum as was required to be set apart and invested by this section, no further guaranty or insurance shall be issued until the deficiency below the amount so required has been supplied. Every corporation organized under the provisions of subdivision one of section one hundred and seventy of the insurance law shall make and file with the superintendent of insurance on or before the thirty-first day of January of each year, a report in writing, setting forth the aggregate amount of the bonds and mortgages outstanding on the thirty-first day of the preceding December the payment of the principal and interest of which has been guaranteed by such corporation. (L. 1892, ch. 690, §176, as am'd L. 1904, ch. 543; vol. 4, p. 433, of Supp. to Birdsey's R. S., 3d ed.)

ARTICLE I.

General Provisions.

Short title. This chapter shall be known as the insurance law, and shall be applicable to all corporations authorized by law to make insurances. (L. 1892, ch. 690, §1; Birdsey's R. S., 3d ed., p. 1819.)

The superintendent of insurance. There shall continue to be a separate and distinct department charged with the execution of the laws relating to insurance, to be known as the insurance department, the chief officer of which shall be the superintendent of insurance. * * * (*Id.*, §2.)

Certificate of attorney-general; corporate names; number of directors. When application is made to the superintendent of insurance by any person desiring to become incorporated as an insurance corporation, or for authority to transact the business of insurance in this state, under or pursuant to any declaration and charter presented for filing in the insurance department, or any amended declaration or charter required by law to be filed, or to be approved by the superintendent, the superintendent shall not file such declaration and charter or grant such certificate of authority until such declaration and charter shall have been examined by the attorney-general, and certified by him to the superintendent to be in accordance with the requirements of law. * * * (L. 1892, ch. 690, §10, as am'd L. 1893, ch. 725; L. 1898, ch. 171, and L. 1900, ch. 366; Birdsey's R. S., 3d ed., pp. 1821-1822.)

Examination by superintendent. If the declaration and charter specified in the preceding sections shall be approved by the attorney-general, the superintendent shall thereupon cause an examination to be made by himself, or by one or more competent and disinterested persons specially appointed by him for that purpose, into the affairs of the corporation or proposed corporation, except in the case of corporations proposing to incorporate under article six of this chapter.

If such persons, after examination made, shall certify under oath, if it be a stock corporation, that the amount of capital required by law has been paid in and is possessed by it in cash, or is invested in the manner required by law; * * * the superintendent shall file such certificate in his department. Every such insurance corporation shall also deposit with the superintendent of insurance, before receiv-

ing authority to transact business in this state, such sums of money or securities as may be required by law. (*Id.*, Sec. 11, as am'd. L. 1893, ch. 725; Birdsey's R. S., 3d ed., p. 1822.)

When corporation to be deemed insolvent. Every insurance corporation specified in articles two, three, four and five of this chapter, whose assets and credits are not sufficient to reinsure its outstanding risks in a solvent insurance corporation, shall be deemed insolvent and may be proceeded against as an insolvent corporation. (*Id.*, Sec. 21.)

Limitation of risk. No domestic insurance corporation, * * * shall expose itself to any loss on any one risk or hazard to an amount exceeding ten per cent. of its capital and surplus. * * * (*Id.*, Sec. 24.)

Examiners and examinations. The superintendent of insurance shall, as often as he deems it expedient, appoint one or more competent persons not officers of or connected with, or interested in any insurance corporation doing business in this state, other than a policyholder, as examiners to examine into the affairs of any such corporation. Such examiners may examine under oath the officers and agents of any such corporation and its books, with reference to its business. Every such corporation, its officers and agents, shall produce its books and all papers in its or their possession relating to its business or affairs for the inspection and examination of such examiners whenever required; and shall facilitate such examination and aid the examiners in making the same so far as it is in their power to do so. * * * (L. 1892, ch. 690, Sec. 39; Birdsey's R. S., 3d ed., pp. 1833-1834.)

Reports of corporations. Every corporation engaged wholly or in part in the transaction of the business of insurance in this state, whether heretofore or hereafter incorporated by a general or special law, except corporations

formed under articles, sixth, seventh, eighth and ninth of this chapter, shall annually, on the first day of January, or within two months thereafter, if a corporation under article two of this chapter, and within one month thereafter, if a corporation under articles three and four of this chapter, file in the office of the superintendent of insurance a statement verified by the oath of at least two of the principal officers of such corporation, showing its condition on the thirty-first day of December then next preceding, which shall be in such form and shall contain such matters as the superintendent shall prescribe. * * * (*Id.*, Sec. 44, as am'd. L. 1897, ch. 493; Birdsey's R. S., 3d ed., p. 1836.)

Appendix B.

Legislative history of Sections 243 and 246 of the Revenue Acts of 1921 and 1924.

1. In a memorandum filed with the Committee on Ways and Means of the House of Representatives on behalf of the American Life Convention, representing 111 legal reserve life insurance companies, when the Revenue Bill of 1918 (40 Stat. 1057) was being considered, it was said (Hearings before the Committee on Ways and Means of the House, 65th Cong., 2d Sess., Pt. I, pp. 840-843):

> "SUGGESTIONS OF TAXATION OF LIFE INSURANCE COMPANIES PRESENTED TO THE WAYS AND MEANS COMMITTEE BY HARRY L. SEAY, PRESIDENT OF THE AMERICAN LIFE CONVENTION.
>
> From figures furnished by the Spectator and the American Underwriter we have gathered the following statistics on 227 legal reserve life insurance companies in the United States on December 31, 1917—227 being practically all the companies doing business in the United States:
>
> | | |
> |---|---|
> | Whole amount insurance in force | $27,973,057,673 |
> | Total premium income | 965,545,988 |
> | New ordinary business written in 1917 | 3,981,347,386 |
>
> Life insurance companies are subject to the following Federal taxes:
>
> 1. As corporations, upon net income (sec. 10, title 1, act of Sept. 8, 1916, and sec. 130, present act). The sum received from this source will approximate $1,500,000.
>
> 2. A capital tax of 50 cents per $1,000 of fair value of capital and surplus and undivided profits, excluding reserves and in excess of $99,000. The sum received from this source will approximate $200,000.

3. The so-called excess profits tax (sec. 200, act of Mar. 3, 1917). As there can only be war losses and no excess profits for insurance companies during the war, and as this section will have to be construed by the courts before companies can know their status thereunder, nothing has been received from this source.

4. A tax of 8 cents on each $100 and fraction thereof of amount for which any life is insured after the passage of the present act. The sum received from this source will approximate $3,200,000.

5. Tax of 10 per cent upon any surplus not distributed within 6 months. Impossible to ascertain what this will bring, but it will be very small.

The total amount received from life insurance companies per annum under existing laws will approximate $4,900,000.

Life insurance companies also have to bear the burden of added expenses produced by—

1. War stamp taxes.

2. Increase of postal rates.

The amount received from the last two items is large, but as the burden falls alike upon all, we offer no suggestions as to them.

From the above you will see that life-insurance companies are mixed in with practically every other line of business; the provisions affecting them are multifarious and confusing, and none of the companies now know whether the returns filed are correct or not. Under existing laws it takes actuaries, accountants, and lawyers to prepare returns, and then no two sets can agree as to what those returns should show. While it is difficult for the companies to make returns, it is still more difficult for the Government to check them, because it requires examiners of more technical and expert knowledge than is usually employed in that class of work. They must be not only expert accountants, but actuaries and lawyers as well. Courts, Commissioners of Internal Revenue, and companies have differed in the interpretation of the law, and the Government and companies can not know what the taxes will be until

courts of last resort have passed on the acts. This is a condition all of us would like to avoid, for litigation is slow, uncertain, and expensive. We believe it would be better for the Government and the companies if the law be so drafted as to clear away every vestige of doubt and confusion and apprise the companies of what they should pay and the Government of what it will receive.

This can be done by the application of a premium income tax. This method is so simple a child can calculate it and an ordinary clerk can check it. The tax should be paid monthly by the companies on the premiums received for the month, and thus the finances of the country would be to some extent relieved of the burden that now falls on them on account of the taxes having to be paid at one time. It is easy to ascertain what the premium income of the companies is. Then determine what amount insurance companies should pay and apply a percentage of that income that will produce the amount desired.

For instance, we know that insurance companies paid approximately $4,900,000 in 1917. If you wish to tax them the same under this new revenue bill, a tax of one-half of 1 per cent. on a premium income of $965,545,988 will give you $4,827,725, or practically the same as raised under the old act. The premium income for 1917 was $90,257,381 more than for 1916, and for 1918 it ought to be $90,000,000 more than for 1917. So the tax for 1918 on a basis of one-half of 1 per cent. of the premium income ought to be close to $5,250,000.

On an estimated premium income for 1918 of $1,000,000,000 a tax of—

One-half of 1 per cent. will produce	$ 5,000,000
Three-fourths of 1 per cent. will produce	7,500,000
1 per cent. will produce	10,000,000

If it is true that the best method of taxation is the simplest, then we have but to compare the uncertainty and confusion surrounding the present plan with the simplicity of the plan proposed in order to determine which to adopt.

Aside from being simple and easy, a premium income tax would be equitable to all. There is no reason for taxing first-year business 8 cents on each $100. That is the most unjust of all taxes and falls heaviest on the companies. The first year's business has to pay the agents' commissions, which will average about 55 per cent.,' the medical examination of $5, and the inspection report of from one or two dollars, and when you add to these the burden of 8 cents on each $100 you force every company to lose on first-year business, even without charging to it any overhead expense. Furthermore, it is not fair to the younger companies, because it compels them to pay a tax on a larger percentage of their business than is required of the older companies. I have in mind a western company with a little over $20,000,000 of business in force which wrote in 1917 $7,072,137, on which it paid the 8 cents tax, or a tax on one-third of its business. One of the older companies, with $1,773,411,526 of insurance in force, wrote for 1917 $209,054,920, on which it paid the 8 cents tax, or a tax on one-eighth of its business. Another inequality is manifest when you consider that the companies writing one particular class of business will have to pay more than other companies. There are companies writing term insurance almost exclusively. This term insurance runs for 5 or 10 years and carries a very low premium—an average, say, of $12 per thousand. That company would be hit a great deal harder in paying 8 cents per hundred, or 7 per cent. of the premium, than the company writing almost exclusively endowment business, the premium on which is larger and runs longer. If the endowment premium is $40 per thousand, which will probably be the average, it is taxed only 2 per cent.

Our proposal is that insurance, and especially life insurance, be given a separate classification and title and be taxed under a special provision which shall eliminate expensive bookkeeping and costly supervision and produce a greater revenue.

We of the South and West and the Younger companies of the East, for whom I speak, are willing to pay taxes. We do not subscribe to the doctrine long urged by publicists that the taxing hand of the Government should not be laid upon the handmaid of

thrift in time of war. We believe life insurance companies, associations, and societies of every name and character should contribute their share and should not be exempt.

But we wish the tax to be equitable, plain and enforceable. We have no net income, no excess or war profits, and no inheritance items in the sense that these are used in the revenue acts and no language of law will convey into the Treasury the sums we should pay under proper construction of the terms of the law under which these items for taxation are defined. No two companies would ordinarily make up financial tables upon exactly the same basis. They have different formulas for valuation; they make up contracts upon differing bases; they are not in any sense uniform as to the features of their contracts. There are distinctions of very great importance in the matter of actuarial calculations between full reserve and other methods of calculating values, present and future, between participating and non-participating forms of policies, and in bookkeeping systems of reckoning the elements entering into the transactions of their business.

While all forms of life insurance, whether fraternal, assessment, participating legal reserve or non-participating legal reserve are based upon the same fundamentals, there is a very marked difference in the manner of calculating liability and consequently of determining assets, surplus, and income. No two companies pay exactly the same so-called dividends and there are vast variations in the manner and times as well as amounts of these dividends. There are distinctions in the condition of cash surrenders, extended insurance, paid-up values, and other incidents of the policy contract. In legal reserve life insurance there is a mathematical certainty in every feature of the policy from premiums to paid-up values and from applicant to beneficiary, but these mathematical calculations and combinations mean nothing to ordinary commercial bookkeeping and accountants.

Hence the phraseology of each of the several bills which require payment of tax by 'every person, corporation, association, and insurance company' has proved inadequate and require a court construction

which in most cases resulted unfavorably to the interpretation of the Treasury Department.

In the opinion of experts, no act can be drawn upon income tax or excess profits principles which will be logically applicable to legal reserve life insurance. This form of commercial fiduciary endeavor should pay taxes for the use of the Federal Government in this emergency and should contribute generously to the common defense fund.

This can be accmplished without difficulty by treating all forms of insurance and indemnity under a separate title and making special provisions for assessing and paying such tax.

Under the present act there are seven provisions affecting life insurance, five of which, as already stated, are inequitable and difficult to apply to our business.

If the Government shall eliminate all reference to insurance companies in the act and make a special chapter for insurance the amount of tax can readily be determined, easily collected, and made mathematically certain in a single paragraph reading about as follows:

* * * * * *

This will bring to the Government monthly a proportionate amount of the annual tax. There will be no difficulty whatever in checking the returns and the opportunity of avoiding payment of taxes is entirely removed.

This should be an emergency tax. It ought to be so understood and should be reduced after the war from time to time. Finally it should be repealed and the several forms of insurance should be relieved entirely from any Federal tax, since insurance is not a Federal function and the States unmercifully tax the business.

Our appearance here today is in response to requests by members of your committee made at a previous hearing on the 12th day of June, 1918. Mr. T. W. Blackburn, secretary of the American Life Convention, was asked to offer some plan that would be more equitable and less confusing. As president of the American Life Convention, I immediately called a meeting of the executive committee of the conven-

tion, which was held in St. Louis, Mo., on June 22, 1918. After going deeply into the question of taxation, the committee, with every member present, unanimously recommended that the premium income be taxed in lieu of all other Federal taxation."

2. In a statement submitted to the Committee on Finance of the Senate, in its Hearings on the proposed Revenue Act of 1921, Robert Lynn Cox, representing the Metropolitan Life Insurance Co. of New York, and appearing as a member of a committee of the Association of Life Insurance Presidents, said (Hearings before the Committee on Finance of the Senate on the proposed Revenue Act of 1921, 67th Cong., 1st Sess., p. 594):

"We wish to present for your consideration a few points on behalf of the life insurance companies.

The tax question, viewed from our standpoint, groups itself, I think, into three general classifications, so far as this hearing is concerned. First, taxes payable by the companies as corporations; second, taxes payable by beneficiaries under life insurance policies; third, taxes payable by life insurance policyholders direct. In the first place, there are the taxes that are imposed upon the companies and are paid by the companies; taxes in various forms. It is not my purpose to discuss that question here today. We think they are unscientifically imposed; that they are unduly burdensome in many respects; that they are unequal and unequitable as between companies. But this particular subject was taken up at the Treasury Department two years ago, and the Senate had before it suggestions coming from the Treasury Department; in fact, adopted them in the Senate, and we are assuming here today that what you considered then will come before you in ordinary course for consideration again.

We were not then asking for a reduction in taxes or an exemption from taxation, and we are not now. The law proposed then, to which we assented, would have increased our taxes, but it would have made them definite and certain from our standpoint and from the standpoint of the Government. It would

have saved much of the litigation in which we have had to engage. There are now literally millions of dollars in litigation under the ambiguities and uncertainties of the present law, and the life companies are very anxious to be rid of that situation.

With that much said about the taxes that are imposed upon us, I would like to consider two or three other points with you.* * *"

3. The Committee on Finance, in its report on the proposed Revenue Act of 1921, said (67th Cong., 1st Sess., Senate Report No. 275, p. 20):

"Sections 242-246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income. The new tax would take the place of the present income and excess-profits taxes for the year 1921, and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital stock tax and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace."

4. The Conference Report on the Revenue Bill of 1921 stated as follows (67th Cong., 1st Sess., House Report No. 486, pp. 39-41):

"Amendment No. 463: The House inserted in the bill a section providing for a new system of taxing life insurance companies, beginning with the calendar year 1922. The Senate amendment made the new system of taxing life insurance companies begin with the year 1921; and the House recedes.

Amendment No. 464: The House bill made the new system of taxing life insurance companies also

applicable to other kinds of insurance companies. The Senate, by this amendment, made the scheme applicable only to life insurance companies and by amendment No. 495 provided a still different method of taxing certain other insurance companies; and the House recedes.

* * * * * *

Amendment No. 495: The House bill provided specifically that every insurance company not exempt under the provisions of section 231 shall make a return for the purposes of this act. As section 239 provides that corporations (including insurance companies) subject to taxation under Title II shall make returns, Senate amendment No. 495 strikes out the above provision of the House bill as surplusage and provides a new system of taxing insurance companies (other than life or mutual insurance companies). The Senate amendment defines the term 'gross income' of such companies to mean the combined gross amount earned during the taxable year from investment income and from underwriting income computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners. 'Expenses incurred' are defined to mean all expenses shown on the aforementioned annual statement approved by the National Convention of Insurance Commissioners; but for the purpose of computing taxable net income only those expenses specifically allowed may be deducted. The House recedes with an amendment making clerical changes."

SUPREME COURT OF THE UNITED STATES.

No. 356.—October Term, 1931.

The United States of America, Petitioner, *vs.* Home Title Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 14, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent filed returns in respect of capital stock taxes for the years ending June 30 in 1923, 1924 and 1925 under § 1000 of the Revenue Act of 1921 and § 700 of the Revenue Act of 1924.[1] The first two reported taxes due. In the other respondent claimed to be an insurance company taxable under § 246 and consequently exempt from the capital stock tax. It made returns and paid income taxes for the calendar years 1921 to 1925 inclusive. In February, 1926, respondent paid under protest the capital stock taxes. It made application for refund and, that being denied, brought this action in the district court for eastern New York to recover the amounts so exacted. The parties submitted the case on an agreed statement of facts. The court gave judgment for the United States. 41 F. (2d) 793. The Circuit Court of Appeals reversed. 50 F. (2d) 107.

The question is whether during the periods for which the capital stock taxes were paid, respondent was an insurance company taxable only under § 246.

Respondent was organized in 1906 under Article V of the New York Insurance Law. It was formed to examine and guarantee title to real estate, to lend money on real estate mortgages and to guarantee such mortgages as to payment of principal and interest and to do the work generally of a title insurance company. It is

[1]Section 1000 of the Act of 1921 is the same as § 700 of the Act of 1924. Section 246 is the same in both Acts. Pertinent provisions of both are printed in the margin of our opinion in No. 355, pp. — —, and need not be repeated here.

under the supervision of the state superintendent of insurance, subject to the laws applicable to title and credit guaranty corporations and maintains the required guaranty fund.

Its business has always consisted of issuing two kinds of contracts: (1) those in which it merely guarantees title and (2) those in which it guarantees (a) title to real estate covered by a mortgage and (b) payment of principal and interest of the debt. Preliminary to the issue of title insurance policies first mentioned, respondent prepared abstracts and made examination of the title. Its charges were based upon a scale dependent upon the amounts of the policies and included fees for examinations, searches and other service incident to the transaction. Policies guaranteeing both title and payment of such mortgage debts were issued substantially as follows. When respondent received an application for a loan, it made an appraisal of the property and an examination of the title. Upon its approval of the application, it received from the borrower his bond and mortgage and paid him the amount of the bond less charges for services incidental to title insurance and also for inspection and appraisal of the property. The fee covering title insurance was made a condition of every loan. Respondent did not charge any lending fee.

It sold the loans at face value and delivered to the purchaser of each a mortgage guaranty or, in case of the sale of part of a loan, a participation certificate. By every such guaranty or certificate, the purchaser appointed respondent his agent to collect principal and interest of the loan, and the latter guaranteed (1) the mortgage to be a valid first lien upon a good and marketable title in fee, (2) payment of principal when collected and in any event within 12 months after maturity and (3) payment of interest at a rate usually one-half of one per cent. less than that specified in the bond. The difference was called premium. Generally about two months elapsed between the making of loans and their sale. The interest for that period was retained by respondent and constituted a part of its gross income.

It never held nor sold mortgages that were not acquired and guaranteed as above stated and never guaranteed other than those controlled by it. Its expenses were not assigned to its different classes of business, and its assets were used indiscriminately in connection with all its activities. Corporations organized under

New York banking laws and subject to the supervision of the banking department are authorized to make mortgage loans and sell them with guaranties such as those given by respondent and from 1921 to 1925 at least two companies thus organized and supervised were engaged in that business.

Respondent's policies merely guaranteeing title amounted to more than six times its mortgage guaranties. A tabular statement in the margin makes the comparison.[2] Its title insurance, not connected with mortgage guaranties, outstanding in each of the five years amounted to more than $100,000,000. Another table[3] states its gross income from sources other than interest, rents, dividends and profits on sale of bonds, and classifies such income so as to show: (1) the difference between interest received and that guaranteed by respondent; (2) fees and charges attributable to mortgage guaranties; (3) fees and charges attributable to title insurance where respondent did not make nor guarantee mortgages or loans; (4) compensation for guaranteeing mortgages to be first liens upon titles in fee; (5) income from mortgage renewals; etc.

The guaranty of payment of the principal and interest of mortgage loans constitutes insurance. *Bowers* v. *Lawyers Mortgage*

[2]Column 1 shows the amount of policies merely guaranteeing titles and column 2 shows the amount of mortgage guaranties.

	1.	2.
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

	1921	1922	1923	1924	1925
(1) Mortgage guaranty premiums	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.98
(2) Inspection and appraisal fees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Title insurance fees where no mortgage guaranty	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Title insurance fees where mortgage guaranty also	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Mortgage renewals	28,940.83	39,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees	3,316.28	4,094.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys	392.45	326.80	569.20	1,339.65	1,993.25
Total	$630,291.01	$925,596.83	$1,059,912.07	$1,160,895.92	$1,420,509.85
Other income	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	$705,458.81	$1,028,820.77	$1,216,633.12	$1,370,822.73	$1,661,054.28

Company, p. —. The amounts received as compensation for insuring title, for guaranteeing that mortgages are first liens and for guaranteeing payment constitute the larger part of respondent's income. And, when there are added the fees and charges for examination of title, appraisals, and other services incident to its insurance business, the total properly assignable to that business amounts to more than 75 per cent. of all respondent's income. Undeniably insurance is its principal business. Indeed, it does not appear that any substantial part of its transactions was not connected with or the outgrowth of insurance. The admitted facts clearly show that in the tax years above mentioned respondent was an "insurance company" within the meaning of that phrase as commonly understood and as used in the Revenue Acts of 1921 and 1924. It was taxable under § 246 and therefore exempt from capital stock taxes.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.